NO. 11952

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION
Appellant,

v.

CIRACO MANEJA, ET AL., *Appellees.*

and

CIRACO MANEJA, ET AL., *Appellants,*

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

This action was brought by Waialua Agricultural Company, Limited (hereinafter referred to as the appellant) as a class action under Rule 23(a) of the Federal Rules of Civil Procedure. The suit was instituted pursuant to Sec. 274d of the Judicial Code, 28 U. S. C. § 2201 (formerly § 400), to secure a declaratory judgment (R. 3, 410-411). The appellees, Ciraco Maneja et al. (who have also appealed from the Judgment below), are (a) employees of appellant, (b) Local 145-7 of the International Longshoremen's and Ware-

housemen's Union, which is the collective bargaining representative of such employees and of all other employees of appellant engaged in performing similar work and (c) Jack Hall, Regional Director of the International Longshoremen's and Warehousemen's Union (R. 3-4). The court was requested to declare the rights of the parties in a controversy relating to the judicial construction of Secs. 3(b), 3(f), 3(j), 7(a), 7(c) and 13(a) (6) of the Fair Labor Standards Act of 1938 (The Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. Secs. 201 *et seq.*) hereinafter called "the Act" (R. 3, 4-5, 7-9).

JURISDICTION

Jurisdiction was conferred upon the District Court by Sec. 24 of the Judicial Code as amended, 28 U. S. C. § 1337 (formerly § 41(8)) and by Sec. 274d of the Judicial Code, 28 U. S. C. § 2201 (formerly § 400) (R. 3, 411). The nature of the controversy between the parties and the necessity for relief of declaratory judgment herein were fully explained in paragraphs 5-9 inclusive of the Complaint (R. 4-9).[1] The Findings with Conclusions (R. 410-437) of the District Court are reported at 77 F. Supp. 480. The Judgment of the District Court (R. 440-445) is not reported. This court has jurisdiction to review the judgment below under Secs. 116 and 128 of the Judicial Code, as amended, 28 U. S. C. §§ 41, 1291, 1294 (formerly §§ 211, 225).

STATUTORY PROVISIONS INVOLVED

The provisions of the Fair Labor Standards Act involved are Sections 3(b), 3(f), 3(j), 7(a), 7(c), and 13 (a)(6). These will be set forth in full or in relevant part in appropriate places in the Argument, *infra*.

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[1] A class action for declaratory judgment is appropriate in controversies between employers and employees pertaining to the proper construction of the Fair Labor Standards Act. *Tennessee Coal, Iron and Railroad Company* v. *Muscoda,* 321 U. S. 590 *reh'g. den.* 322 U. S. 771; *Jewell Ridge Coal Corp.* v. *Local No. 6167,* 325 U. S. 161, *reh'g. den.* 325 U. S. 897; *Bowie* v. *Gonzalez,* 117 F(2d) 11 (C. C. A. 1).

STATEMENT OF THE CASE

The facts in this case are undisputed. They are set forth in a Stipulation of Facts (R. 129-256) (hereinafter called the Stipulation) which is an extremely vital part of the Record and contains all the facts pertinent to a determination of the issues involved in the case. Briefly summarized, these facts are:

Appellant operates a sugar plantation[2], located in the County of Honolulu, Island of Oahu, Territory of Hawaii. Since the incorporation of appellant in 1898, it has been engaged almost exclusively in the growing, cultivating and harvesting of sugar cane on land owned or leased by it (R. 131, 411-412), and the processing of such sugar cane into raw sugar and molasses on the plantation where produced (R. 65, 130, 131, 138-139, 256). The appellant processes no cane except that grown by itself on its plantation (R. 184), nor does it engage in any sugar refining operations (R. 132). During 1945, the appellant produced 56,193 tons of raw sugar (R. 132, 411). Substantially all of the land (9,663 acres) now devoted to sugar cane production has been owned or leased and used by appellant for this purpose since 1910 (R. 133, 411).

On its plantation appellant prepares and plows the fields for the planting of sugar cane; plants sugar cane; "ratoons" the fields[3]; cultivates sugar cane; applies fertilizer to cane fields; irrigates cane fields by a network of irrigation ditches and water storage reservoirs; harvests sugar cane; maintains a network of field roads for the

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[2] The parties have stipulated that the term "plantation" means the geographical area on which the appellant produces sugar cane, processes it into raw sugar, and conducts related operations (R. 65, 130, 256).

[3] "Ratooning" is a term referring to the operations performed after a field is harvested to prepare the field for the growing of another crop. In such preparation the old cane stools or stubble are left in place and the ground is refurrowed into rows. The undamaged cane stools or stubble will then send up new shoots upon application of water and fertilizer to the field. New seed is added to fill in blank spots or to replace damaged stools or stubble (R. 142-143).

transportation of labor, field supplies, and equipment throughout the plantation; and transports sugar cane by a narrow-gauge railroad from the fields where grown to the mill.[4] At the mill the appellant grinds the sugar cane into raw sugar and molasses and loads bagged raw sugar and molasses for shipment to the continental United States, or stores such products temporarily in the sugar warehouse or molasses tanks (R. 139-183, 412). The loading of the bagged raw sugar and of the molasses into railroad box and tank cars of the Oahu Railway and Land Company, an independently owned and operated carrier, at the site of the mill and the pushing of the cars from such site onto a nearby spur of such carrier complete the operations of the appellant and the work of its employees relative thereto (R. 131-132).[5]

Sugar cane cultivation and processing are physically and functionally integrated. Sugar cane is highly perishable and starts to deteriorate immediately after harvesting. To avoid serious losses it must be processed into sugar, syrup or molasses within a few hours after being harvested. For this reason and because of the great weight and bulkiness of cane as compared with raw sugar, it must be processed within a few miles of where it is grown (R. 133). Substantially all the cane growing land of the appellant, its buildings and yard area, and other lands owned or leased by the appellant, but unsuited for cane growing, including a wooded area from which fire wood is cut for use as fuel by the appellant's employees living in the

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[4] The parties have stipulated that the term "mill" means the building and equipment of the appellant used in the actual processing of sugar cane into raw sugar, including cane carrier, cane cleaning plant and scales, crushing plant, boiling house, fire room, power plant, sugar warehouse, and molasses tanks, and all equipment therein (R. 131).

[5] The Oahu Railway and Land Company discontinued its operations in 1947 after the conclusion of the trial below. Such railroad had previously been used not only to carry the appellant's bagged raw sugar and molasses but also to deliver incoming plantation supplies and equipment. The outgoing and incoming freight of the appellant's plantation are now handled by an independently owned and operated trucking company (R. 159).

plantation villages hereinafter described, form a contiguous and compact area (R. 134), as shown on Exhibit A of the Stipulation (R. 65, 256).

All the lands devoted to the growing of sugar cane are managed and operated by the appellant as an integrated farming unit and single enterprise with identical cropping, cultivation and harvesting practices, and with the same labor and equipment. Employees work in the fields moving from one area to another depending upon the program of plowing, planting, irrigating, fertilizing, applying herbicides and insecticides, weeding and harvesting. The cane lands are in various stages of production or preparation. Some acreage is being plowed and furrowed for new planting, some is being "ratooned", some acreage is in young growth, some in old growth nearing maturity and other acreage is being harvested. The growing, harvesting and processing of the cane and the marketing of the raw sugar constitute one continuous and year around operation, except that annually, harvesting and processing of cane are suspended for approximately 3 months solely for the purpose of reconditioning the mill and equipment (R. 135-136, 210, 413).

Hauling on Plantation. Cane-growing land is crisscrossed with a network of plantation field roads and a narrow gauge railroad owned by the appellant (R. 135). Most of the field roads are dirt surface and are maintained by the appellant. Appellant operates trucks and trailers on these roads to haul laborers and agricultural supplies and equipment used for planting, cultivating and harvesting to and from the fields. When there is a shortage of supplies or equipment at the plantation, appellant's trucks may go to Honolulu or elsewhere on Oahu to obtain them (R. 164-166).

In the harvesting operation, cane loading machines grab the standing or growing cane and load it onto rail cars located on portable tracks temporarily laid in the cane fields (R. 154, 155-156, 160, 361). The cars are then hauled or pushed by tractors to "main line" or permanent narrow gauge trackage at the edge of the fields and

hauled thereon by locomotives to the processing mill in one continuous journey (R. 157, 160, 161). On return from the mill, empty cars are moved to some point near the harvesting operations (R. 161) or else they are removed from the mill yard to nearby spurs (R. 234). The narrow gauge "main line" is used to a minor extent to transport some agricultural supplies and harvesting equipment between the plantation buildings and yard area and the fields (R. 159).

The narrow gauge railroad has been owned and operated by appellant since its organization in 1898. It is constructed, located and operated exclusively on the plantation. It hauls no cane or freight for anyone other than the appellant (R. 158-159). Cars used on this narrow-gauge railroad carry an average load of 4 and ¾ tons per car gross cane (R. 157).

Steam and electric power. The extraction of the juices from the sugar cane fibre and the processing of such juices into raw sugar require large amounts of power. It is therefore traditional in sugar cane processing to utilize bagasse (the cane fibre remaining after the juices are extracted from the cane stalks) as an economical source of fuel for the production of power for use in performing the various processing operations. Bagasse produced by the appellant has no marketable value. The room in which the bagasse is burned and the steam is produced is known as the fire room and is located in the mill (R. 186, 187).

The bagasse is used to produce steam, which in turn is used (a) to drive the mill engines and cane processing equipment, (b) to heat and evaporate the sugar juices and crystallize the raw sugar, and (c) to generate electric power needed in the various operations of the plantation (R. 186, 188, 189). The steam used for this latter purpose, after passing through the generating machinery, is conveyed through steam lines for further use in the processing operations of the mill (R. 188-189, 190-191).

Electric power generated by the plantation is not sufficient to supply its needs. More than a third of the power which it uses is purchased from the Hawaiian Electric

Company, Ltd., an independently owned and operated public utility on the island of Oahu (R. 191).

The power generated and purchased by the appellant is distributed to its various operations on the plantation and also to several small non-plantation users living in the plantation community (R. 191-192).

The total amount of power used by all non-plantation users is approximately one-half of one percent of the total power distributed by the appellant and is gradually becoming even less. None of the electric power distributed by the appellant to non-plantation users is used for or in connection with the production of goods for interstate commerce, nor is it used to operate any instrumentality of interstate commerce, nor is it transmitted into interstate commerce (R. 192-193).

During the off-season, described hereinafter p. 8, when the steam and electric power equipment in the mill are overhauled, the appellant generates no electric power but purchases all the power it needs from the Hawaiian Electric Company (R. 194).

Service shops. Both field and mill operations necessitate the equipping and maintaining of complete service shops for prompt minor repairs and emergency work and major overhaul. A group of small repair shops are therefore located in an area extending not more than 300 feet from the mill building (R. 114, 194-195, 256).

Concrete products. The appellant makes irrigation flumes, water supply pipe, and a few other concrete products in a small building, which is located on plantation lands adjacent to the plantation buildings and yard area. Such products are all used on the plantation in connection with its operations (R. 114, 206-207, 256).

Storage of supplies and materials for appellant's operations takes place in several buildings located in the plantation buildings and yard area (R. 207).

Work schedule of mill employees. Production in the mill operations of appellant is keyed basically to a six-day week with continuous and around-the-clock operations, the mill stopping the grinding of cane at 2:00 p. m. on

Saturdays and starting up at 2:00 p. m. on Sundays. The 24-hour day is divided into three 8-hour shifts (R. 183, 413).

Week-end repair of mill. The weekly 24-hour shutdown period of the mill is necessary to perform cleaning and repair operations. While, in general, repairs are performed during the week-end, every effort is made to anticipate week-end requirements and the various service shops located near the mill perform as much work as possible while the mill is in operation (R. 183, 184). Sugar remains in process during the week-end (R. 338, 357, 434).

Off-season activities. Because of the slight variation in climatic and weather conditions from month to month, *sugar cane is grown the year around in the Territory and can be harvested and milled any month in the year—and frequently is.* Solely for efficiency of operations, sugar mills of the Territory must be closed down annually for extensive and general repair and reconditioning because of the heavy wear and tear on mill machinery and equipment. That part of the year when the mill is shut down for repairs is termed the "off-season". If these repairs were not done annually, operating shutdowns would be frequent and excessive losses would be incurred. The appellant's off-season averages three months per year. During the off-season there are no harvesting, ratooning, cane transportation or cane processing operations. All field operations other than harvesting, ratooning and cane transportation continue throughout the year (R. 210, 212, 213, 413).

Most of the off-season repair work is done by the men who operate the mill during the grinding season. *Just as many man-days of work are performed daily in the mill during the off-season as during the grinding season.* All mill employees are employed on a forty-eight hour workweek both during the grinding season and the off-season (R. 213, 214-215).

Plantation Villages. At the present time appellant owns 820 dwelling houses, all of which are located on the plantation. Most of them surround the plantation buildings and

ard areas. Approximately 335 houses, however, are scattered over the plantation, some of this latter number being clustered and forming field villages (R. 221).

At the time the appellant company was organized, there was no established community having housing or other services or facilities for living in or near the area which it proposed to devote to the production and processing of sugar cane. Consequently, it became necessary for the appellant over a period of years to construct houses, develop services and otherwise establish facilities for permanent living on the plantation to serve the needs of the required number of employees and their families (R. 219). The principal plantation community was established around the plantation buildings and yard area and came to be known as the village of Waialua (R. 65, 220, 256).

Waialua village has all the physical and visual characteristics of an established community and is similar to a typical small village or town of a farming community center. The area is criss-crossed with government roads and also roads constructed and maintained by the appellant. This plantation community contains the usual services and typical commercial establishments to be found in any small town or village, including stores, a bank, motion picture theatres and other service establishments, which are owned and operated by independent businesses. The appellant also owns and operates for its employees and the general public a store, an automotive service station and a hospital. A United States post office, public library, churches, and schools operated as a part of the Territorial School System are also located in this plantation area. There are also two gymnasiums, a club house, a swimming pool, tennis courts, an athletic field and a beach house, all of which were constructed by the appellant and are used by an Athletic Association, the membership of which is composed of both appellant's employees and other persons in the general community, which operates these facilities through dues collections (R. 220, 222-223).

The 820 dwelling houses on the plantation are occupied by 3,373 persons, of whom 2,952 are employees and pen-

sioners of the appellant, and their families. The remaining 420 persons living in such houses are lessees and their families who are not employed by the appellant and who either work off the plantation or who own, operate or are employed by independently controlled businesses within it (R. 222). The occupants of the houses are provided not only with housing and housing maintenance but also, if they so desire, with water, firewood and fuel, electricity, medical care, recreational facilities and various maintenance services including garbage disposal and street cleaning (R. 219-220).

No employee covered by the appellant's existing collective bargaining agreement, including each and every employee appellee herein, is required as a condition of employment to live on the plantation or in plantation houses or to use any service or facility which the appellant may be in a position to render its employees (R. 221). Some employees of appellant live off the plantation and in houses not owned or supplied by appellant (R. 222). The relationship which exists between the appellant and its employees who live in plantation houses is that of landlord and tenant; employees pay cash to the appellant for all facilities and other services furnished them. Employees of the appellant render services and perform maintenance work on plantation houses and village areas (R. 220-221).

After the plantation was established and continued to operate there gradually grew up an independent community now known as the village of Haleiwa, which is located off the edge of the plantation, a little more than a mile from the village of Waialua (R. 220). This village is a small business and residential community made up of privately owned residences and typical small retail and service establishments. Haleiwa caters to appellant's employees and to surrounding community residents, who include persons working at other locations on the Island of Oahu, residents of numerous beach houses and Army and Navy personnel using beach recreational facilities. To some extent the village of Haleiwa has become integrated

with the village of Waialua with common fire protection equipment and public police patrol officers serving both communities (R. 223).

Duties of employee appellees. Each of the employee appellees is engaged in performing some of the operations of appellant which are described above (R. 224-225). A detailed description of the work and duties of each such employee appellee will be found in paragraphs 39-86 of the Stipulation (R. 225-255) and will be more fully discussed in the Argument, **infra**, pp. 17-21, 52, 71-72. As already noted, however, the work and duties of each employee appellee are performed in connection with and as a part of the plantation operations described in full in the Stipulation, and the work and duties of each employee appellee must be considered as further described by such description of the plantation operations to the extent that such description is related and applicable to the particular work and duties described for the several employee appellees (R. 224-225).

Findings with Conclusions and Judgment of the District Court

The District Court entered general Findings with Conclusions (R. 410-437) which did not indicate precisely what the Court's holdings were with respect to many of the activities performed by the employee appellees and other employees of appellant similarly situated. Counsel for the parties therefore agreed upon and presented to the court a form of judgment containing detailed findings as to the many various activities conducted by said employees. The court, however, insisted that the judgment be abbreviated and thereafter entered the Judgment (R. 440-445) appealed from.

The District Court held that all the employee appellees and all other employees of appellant similarly situated, including the employees repairing and maintaining the plantation houses and related domestic facilities, are engaged in commerce or the production of goods for commerce (R. 440-441). With respect to the agricultural ex-

emption from the overtime provisions of the Act provided by Sec. 13(a)(6), the court in general denied its applicability except to certain specified work performed in the fields (R. 441-442). As for the processing exemption from the overtime provisions of the Act provided by Sec. 7(c), the court confined said exemption to certain specified activities performed in the appellant's mill building and even then allowed the exemption only while cane processing operations were actually being conducted or during breakdowns with the operating staff of appellant standing by waiting for the repairs to be completed (R. 442-444). Weekend cleaning or repairs at the mill and work at the mill during the off-season were held non-exempt under Sec. 7(c) (R. 444). Employees engaged in all truck and railroad hauling on the plantation (except portable track hauling) were held non-exempt under both Sec. 13(a)(6) and Sec. 7(c) (R. 424-425, 426, 427, 428, 430-431, 444).[6]

The court further held that if in any workweek an employee appellee or any other employee of appellant similarly situated performs some work which is exempt from the overtime provisions of the Act by virtue of Sec. 13(a)(6) or Sec. 7(c) and other work which is not so exempt, such employee is for that workweek not exempt from the over-

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[6] To understand the holdings of the court, its Judgment must be read together with its findings with conclusions. While the Judgment specifically lists the activities that are held exempt under Sec. 13(a)(6) or Sec. 7(c), it does not list the activities held non-exempt. The judgment initially presented to the court by counsel for the parties and which the court refused to enter did specifically list all the activities involved in the case which are non-exempt under the court's decision. The court's refusal to enter the judgment enumerating all such activities was not based upon its disagreement therewith, but simply upon the ground that the detailed enumeration was unnecessary and that it was sufficient merely to state in Part V of the Judgment (R. 444) that all activities other than those listed as exempt under Sec. 13(a)(6) or Sec. 7(c) are non-exempt. In order, however, for this court clearly to comprehend the issues in this case, it is of paramount importance that it know precisely what the activities are which were held non-exempt. In our Argument *infra,* we shall explain in detail what such various activities are.

time provisions of the Act under either Sec. 13(a)(6) or Sec. 7(c) (R. 445).

Finally, the court held that if in any workweek an employee appellee or any other employee of appellant similarly situated performs activities, some of which are exempt under Sec. 13(a)(6) and the remainder of which are exempt under Sec. 7(c), such employee is exempt for that workweek from the overtime provisions of the Act (R. 445).

QUESTIONS PRESENTED

1. Are the employee appellees, as well as all other employees of appellant similarly situated, "employed in agriculture" as the term "agriculture" is defined in Sec. 3(f) of the Act and therefore exempt from the overtime provisions of the Act as provided by Sec. 13(a)(6) thereof?

2. Assuming, but not admitting, that any of said employees is not so exempt by virtue of Sec. 13(a)(6), is he exempt from the overtime provisions of the Act throughout the year, or any part thereof, by virtue of Sec. 7 (c) of the Act which provides that "in the case of an employer engaged . . . in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup," the overtime provisions of the Act "shall not apply to his employees in any place of employment where he is so engaged"?

3. If during the same workweek an employee appellee or any other employee of appellant similarly situated engages in an activity exempt under Sec. 13(a)(6) or Sec. 7(c) of the Act and does not engage for any substantial part of his time during such workweek in an activity not so exempt, is he exempt for that workweek from the overtime provisions of the Act by virtue of Sec. 13(a)(6) or Sec. 7(c)?

4. Are the employee appellees, when they are repairing and maintaining plantation dwelling houses and related domestic facilities, and all other employees of the appellant, when they are performing similar work, "engaged in commerce or in the production of goods for commerce" as the terms "commerce" and "produced" are defined in Secs. 3(b) and 3(j) of the Act?

SPECIFICATION OF ERRORS

The District Court erred as follows:

1. In holding that each and every employee appellee and any other employee of appellant similarly situated are "engaged in commerce or in the production of goods for commerce", as the terms "commerce" and "produced" are defined in Secs. 3(b) and 3(j) of the Act, when they are employed in building, repairing and maintaining dwelling houses and related domestic facilities in appellant's plantation villages or in performing similar work.

2. In failing to hold the exemption provided by Sec. 13(a)(6) of the Act applicable to each and every activity described in the Complaint and Stipulation.

3. In failing to hold that the exemption provided by Sec. 7(c) applies to any activity connected with the transporting of sugar cane from the fields to the mill, processing sugar cane into raw sugar including the temporary storage and shipment of raw sugar, and their necessary and related operations including (a) activities performed by the service shops personnel, (b) the operation, maintenance and repair of equipment, machinery and facilities used by the appellant in its mill on the plantation to burn bagasse or fuel oil or to produce steam or to generate or distribute electricity, and (c) the cleaning or repair of the appellant's mill and equipment therein on the plantation during weekends or the off-season when the processing operations of appellant are suspended or discontinued.

4. In failing to hold that in any workweek in which any employee appellee or any other employee of appellant similarly situated engages in an activity which is exempt from the provisions of Sec. 7(a) of the Act by virtue of either Sec. 13(a)(6) or Sec. 7(c) and does not engage for any substantial part of his time during that workweek in an activity which is not so exempt, said employee is exempt for that workweek from the provisions of Sec. 7(a) of the Act by virtue of Sec. 13(a)(6) or Sec. 7(c).

ARGUMENT

I.

All of the Employee Appellees Are "Employed in Agriculture" Within the Meaning of Sec. 3(f) and Therefore Are Exempt from the Overtime Provisions of the Act as Provided by Sec. 13(a)(6).[7]

A. Mechanization of agricultural operations is immaterial.

Sec. 13(a)(6) of the Act exempts from both the wage and hour provisions thereof "any employee employed in agriculture". Sec. 3(f) defines the term "agriculture" as follows:

> " 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

To be exempt, an employee must simply be employed in one or another of the activities or practices referred to in the statutory definition. "Employment in agriculture is probably the most far reaching" of the exemptions in the Act. *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607, 612.

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[7] Sec. 13(a)(6) also grants exemption from the wage provisions of the Act. This is immaterial in this case since appellant's lowest paid employee receives an hourly rate substantially in excess of that required by the Act (R. 255). The hourly wage rates of appellant's rank-and-file employees range from a minimum of 80 cents (twice the minimum wage established by the Act) to a maximum of $1.38 (R. 136).

Although the Act in its general purposes is remedial in character, it is equally remedial in its specific purpose of according broad agricultural exemptions "and its remedial provisions inure to the benefit of those shown to be engaging in such excepted activities". *McComb* v. *Hunt Foods, Inc.*, 167 F. (2d) 905, 908 (C. C. A. 9). As clearly appears from the broad wording of the exemption as well as from the legislative history of the exemption, the purpose and intent of Congress was to free agriculture of the cost and other obligations imposed upon industry.

The court below nevertheless appears to have predicated its entire decision on the view that appellant's operations are integrated, mechanized and "industrialized" (R. 420-428). That factor is wholly immaterial. The agricultural operations here involved are exempt under the statutory intent and language. Appellant's field operations are no less mechanized than its processing or transportation operations (R. 156-157, 216). To accept fully the District Court's viewpoint would lead to the absurdity of not exempting such obvious agricultural operations as plowing, weeding, irrigating or harvesting, all commonly done by mechanized equipment.

In *Damutz* v. *Pinchbeck*, 158 F. (2d) 882, the Second Circuit held exempt under Sec. 13(a)(6) a fireman employed in a greenhouse, notwithstanding that it considered his conditions of employment to be more nearly like those of a factory worker than those of a worker on the ordinary farm. Emphasizing that his work came within the exemption language, the court said (158 F. (2d at p. 883):

> "Although this exemption provision in a remedial statute should be construed strictly, it should, of course, be given due effect. It is drawn in far reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activity and that is what now controls. Differing definitions of 'agriculture' in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one".

See too *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607, 614, where the court discussing the agricultural processing exemption granted by Section 13(a)(10), stated that when Congress desired to make exemptions in the Act depend upon size and quantity, it used appropriate language to refer to size and quantity specifically. *Cf.* also the Hawaii Wage and Hour law, which exempts employees in "agriculture" (such term being defined precisely as in the Federal Act) only if the employer employs less than 20 persons. Revised Laws of Hawaii, 1935, chapter 259-c, Title XXVI, as amended, Sec. 2(e)(2).

The court will take judicial notice of the extraordinary technological advances in American agriculture in the generation preceding enactment of the Act.[8] Congress legislated with full knowledge of these facts, and has since declined to deny exemption to so-called "mechanized" or "industrialized" agriculture, notwithstanding arguments presented in behalf of Hawaiian plantation employees by the very union here involved. *Infra,* p. 40.

B. Description of operations held non-exempt.[9]

The District Court evidently believed, as appears from its findings with conclusions and judgment, that in order to qualify for the agricultural exemption, an employee must work not only on the appellant's farm but in the cane-growing fields themselves (R. 424-425, 428, 441-442). But as will appear below, not even all work done in the fields was held exempt. A description of the operations held non-exempt under Section 13(a)(6) follows:

1. *Hauling by narrow gauge railroad* of sugar cane from the appellant's fields to its mill is part of the continuous

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[8] *U. S. Census of Agriculture* (1945) pt. II, p. 65. Farms or plantations the size of appellant's are not at all rare in the United States and its Territories and possessions; the last census of agriculture disclosed more than 7100 farms with 10,000 acres or more. *Id.* See also Supp. Rep. 1012, pt. 2, Committee on Education and Labor, 79th Cong., 1st Sess., p. 77.

[9] Among such operations are the building, repairing, and maintaining of dwelling houses and related domestic facilities in the appellant's plantation villages. These will be considered *infra,* pp. 77-78.

integrated operations on the plantation. *Supra,* pp. 5-6.

Employees engaged in this operation move the trains to and from the mill, maintain and repair the main line trackage, install field switches for connecting main lines of the railroad to field portable track lines, pick up cane spilled along the rights of way, maintain, service and repair the locomotives and cane cars, protect the public at road crossings, dry and maintain a supply of sand for use by locomotives, clean, weed, maintain and repair railroad track beds and perform other duties in connection with railroad hauling on the plantation (e.g. R. 157-158, 160-161, 162-163, 195, 196, 197, 198, 202, 203, 229, 231, 232, 234-235, 242, 243, 244, 249, 251, 253).

2. *Hauling by truck of agricultural supplies, equipment, and laborers* to and from the fields and hauling by truck plantation supplies and equipment from Honolulu to the plantation are likewise coordinated with and part of the over-all production operation.

Employees engaged in these hauling activities operate, repair, service and maintain the trucks and other equipment and facilities used in these activities, load and unload the supplies and equipment they carry, and maintain and repair the field roads located on the plantation (e.g. R. 164-166, 195, 197-198, 200-201, 227, 232, 233, 237, 242, 243, 244, 246, 247, 250).

3. *Repair and overhauling of agricultural equipment* [10] is carried on as part of the integrated plantation operations. Because of the interdependence of the appellant's operations, breakdowns of agricultural equipment and machinery may result in a shutdown of the entire operations (R. 195). It is necessary therefore for appellant to maintain the service shops previously mentioned, *supra,* p. 7.

Employees attached to these service shops and also other employees perform necessary maintenance, service, repair and overhauling work on all types of agricultural equipment and implements used in the growing of sugar cane

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[10] The court below held repair work on agricultural equipment to be exempt only if done in emergencies *and* in the cane fields (R. 442).

on the appellant's plantation (e.g. R. 195 *et seq.*, 225, 226, 227, 229, 230, 231, 232, 233, 241, 242, 243, 244, 245, 246, 247).

4. *Shoeing of horses and mules* is done on the appellant's plantation. Horses are used by the harvesting overseer to ride in the fields. Pack mules are used on occasion to pack agricultural supplies, broken concrete flumes, etc., used in the cane fields (R. 210). Employees feed the horses and mules and also shoe them (R. 210, 244).

5. *Storage and handling of plantation supplies and equipment,* referred to on p. 7, *supra,* are done by warehousing personnel. Among the items stored are herbicides, fertilizer, farm equipment, lubricants, fuel oil, and cement. Such employees do the bookkeeping, handle the accounts, unload, unpack, check and store stocks and materials, keep stock record cards, take inventory, check out merchandise to mill, fields, and shops, and prepare order lists for new materials and supplies (R. 207, 208-209, 251, 253, 254).

6. *Construction and repair of irrigation and water supply facilities and equipment* are required for the entire plantation acreage devoted to sugar cane production (R. 145). In addition, water is required in the cane processing operations of appellant (R. 146, 170). As a consequence, an extensive and comprehensive system of water supply from surface and artesian sources has been developed on the plantation (R. 145, 146).

The employees engaged in these irrigation and water supply operations dig and maintain on the plantation trenches, ditches and tunnels used for irrigation and drainage of the appellant's cane fields and for irrigation pipe lines; build wooden gates for flumes; make irrigation scoops in connection with the irrigation operations; make concrete irrigation flumes and water supply pipe; weld irrigation pipe lines and siphons; operate, repair and maintain irrigation pumps and pumps used to supply water to the mill for cane processing; and perform other miscellaneous activities in connection with the irrigation and water supply operations (e.g. R. 150, 195, 196, 197, 198, 201, 202, 203, 206, 226, 228-229, 242, 243, 244-245, 248, 249, 252).

7. *Processing of sugar cane into raw sugar and molasses, temporary storage, loading and shipment of same and maintenance and repair of processing equipment.* Loaded cane cars are delivered on the appellant's narrow gauge railroad to the mill yard to be moved up to the mill (R. 166). At the mill, the cane is weighed, unloaded, washed, and as much trash as is mechanically possible is removed. Such trash is hauled away from the mill and unloaded in appellant's cane fields. Sometimes locomotives bringing in cane cars may move the cars directly into position for unloading into the mill (R. 166, 168-172, 237). After the cane is unloaded, the empty cars are removed to the mill yard (R. 166, 443).

The time elapsing between the loading of cars in the field and the unloading into the mill may vary from four to sixteen hours. Harvesting activities and mill activities are closely coordinated to reduce to a minimum this time lapse since sugar cane is highly perishable and starts to deteriorate once it is cut (R. 167).

The cane, after being cleaned, is crushed, the sugar juices clarified and crystallized, the raw sugar bagged and shipped, or temporarily stored and then shipped, and the molasses pumped into a storage tank (R. 172-183, 184-186). The molasses is thereafter delivered to a carrier for shipment to the continental United States (R. 181).

Employees perform the various duties connected with the processing of sugar cane into raw sugar and molasses and with the temporary storage, loading and shipment of same (R. 166 *et seq.*, 231, 234, 236-240, 251-252).

The processing operations also necessitate the maintenance of the service shops previously referred to (p. 7, *supra*). Machinery breakdowns in the mill may result in a shutdown of the entire mill which, because the harvesting and mill operations are so closely coordinated, in turn necessitates discontinuance of the harvesting and transportation operations until the mill repairs are completed (R. 195). Employees attached to the service shops and also other employees perform necessary maintenance, repair and overhauling work on the equipment and facilities

used on the appellant's plantation in the processing of sugar cane into raw sugar and molasses, the bagging of raw sugar and the loading, storing and shipment of raw sugar and molasses, while cane is being ground in the mill as well as during periods of shutdown on week-ends and in the "off-season" (e.g. R. 183-184, 195 *et seq.*, 212-214, 232, 236, 237, 238-239, 240, 241-242, 243, 244, 245, 246, 248, 249, 250, 255).

8. *Repair and maintenance* of plantation buildings and grounds and shop tools is done primarily by employees attached to the service shops and the village maintenance employees hereinafter discussed in Part IV of our Argument, but other employees may also perform such work (R. 202, 203, 212-214, 230, 231, 233, 240, 248, 249, 250, 254-255). Other employees work in the fields clearing same of stones, and loading and hauling away the stones which are used for structural or building purposes on the plantation (R. 140-141, 225, 226, 436).

9. *Power equipment and facilities,* already described, are operated, maintained and repaired as an integral part of the appellant's production of sugar cane and the processing of same into raw sugar and molasses. The employees so engaged are employed in operating, maintaining and repairing the equipment and facilities used by the appellant in its mill to burn bagasse or fuel oil or to produce steam or to generate or distribute electricity (R. 189-190, 194, 201-202, 213, 214, 240-241, 248).

10. *Clerical* employees of appellant perform the necessary clerical work on the plantation, such as the keeping of books, records, time, etc., in connection with the appellant's entire plantation operations of producing sugar cane and processing same into raw sugar or molasses (R. 168, 171, 208-209, 236, 249, 251, 252, 253-254).[11]

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[11] There is nothing in the Record to support the finding of the court below that among the activities appellant conducts, in addition to those discussed in the text, are railroad building, surveying and fencing (R. 412).

C. The language of the statute shows that all employees of appellant here involved fall within the exemption for "agriculture".

We submit that the court need only examine the definition of agriculture contained in Sec. 3(f) in order to conclude that the employees engaged in the above described operations come within the exemption provided by Sec. 13(a) (6) for "employee[s] employed in agriculture". The courts will give effect to the "plain meaning" of the statutory language (*United States* v. *American Trucking Ass'ns., Inc.,* 310 U. S. 534, 543; *Kirschbaum* v. *Walling,* 316 U. S. 517, 524) "according to the sense of the thing, as the ordinary man [would understand] ordinary words addressed to him". *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607, 618.[12]

1. "*Farming in all its branches*". The statutory definition of "agriculture" starts with "farming in all its branches" and then provides "and *among other things* includes" [Emphasis supplied]. There follows an enumeration of *several* farming operations. We shall show hereinafter that the farming operations enumerated embrace all the activities here involved. But apart from this, the use of the phrase "among other things" precludes any contention that the enumeration is anything more than illustrative of the plenary farming operations which the definition embraces.

Most of the appellant's operations held non-exempt by the District Court clearly come within the phrase "farming in all its branches".

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[12] Since the statute itself defines its exemptions in precise and definite terms, the court below erred in admitting the opinion testimony on those exemptions as here applied of Jack Hall, Regional Director of the International Longshoremen's and Warehousemen's Union for the Territory of Hawaii. Congress was unwilling to have the application of the Act, including the exemptions, rest upon the indefinite and nebulous basis of "expert" opinion. Mr. Hall's argumentative testimony really invaded the province of the court. His testimony should also have been stricken as hearsay (R. 268, 323-325, 327, 328, 329) and as lacking in credibility (R. 319-320, 321-323).

Thus, it is an indispensable part of sugar cane farming: (i) to haul the harvested perishable cane from the fields on the plantation to the mill on the plantation for quick delivery for processing (R. 133, 167) and to maintain, service and repair the hauling facilities; (ii) to haul fertilizer, insecticides, herbicides, agricultural equipment and supplies[13] and field laborers from one part of the plantation to another and to maintain, service, repair and operate trucks and field roads used for such hauling; (iii) to haul necessary supplies and equipment from a nearby town to the plantation and to maintain, service, repair and operate the hauling facilities; (iv) to repair and overhaul agricultural equipment and implements used in the cane production; (v) to feed and shoe horses and mules used on the plantation in connection with the growing of sugar cane; (vi) to irrigate cane fields where there is insufficient rainfall and to maintain, service, repair and operate irrigation facilities located on the plantation itself and used exclusively in connection with the production of its cane (R. 111, 145 *et seq.*, 256); (vii) to maintain the farm buildings and grounds and tools and implements used in the farming operation; and (viii) to keep necessary records by clerical help where required.

Each of the above activities conducted by the appellant is an integral part of its operations of producing, cultivating, growing and harvesting sugar cane. As such they all fall within the statutory phrase "farming in all its branches". Such activities are functionally similar to the activities conducted by vast numbers of grain farmers, cotton farmers, fruit and vegetable farmers, etc., in various areas of the country.

2. "*Harvesting of . . . agricultural . . . commodities.*" The court below held the term "harvesting" appearing in Sec. 3(f) of the Act to embrace the operations of lay-

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[13] Appellees' original Answer admitted that the transportation of fertilizer and other field supplies from the appellant's storage places and yard area to its fields is within the exemption (R. 124). The lower court nonetheless denied the applicability of the exemption to such operation.

ing and shifting portable tracks in the fields, spotting rail cars on such tracks, loading same with cane, hauling them from the fields to the main railroad tracks, and picking up and reloading cane stalks which fall from the cars between the fields and the mill (R. 428-429, 442). We submit that the hauling, likewise on the plantation itself (R. 159), of sugar cane on the permanent tracks from the fields to the mill clearly falls within the term "harvesting of . . . agricultural . . . commodities" appearing in Sec. 3(f).

In Webster's New International Dictionary[14] the term "harvest" is defined, p. 1142, as: ". . . To reap or gather, as any crop, material, or result. . . *To gather in a crop*" [Emphasis supplied]. The Standard Dictionary published by Funk and Wagnalls (1935 Ed.) defines the verb "harvest" as: "1. To gather and store, as a crop, reap. . . . 3. To *gather* and *store* a crop" [Emphasis supplied]. The Encyclopedia Britannica (14th Ed.) at page 231 carries the word "harvest" as a principal heading and in relevant part speaks of "Harvest, the season for the ingathering of crops. . . ."

The appellant's operations of hauling perishable sugar cane from the fields to the mill on its main line tracks—all on the farm—are merely part of the gathering in and storing of sugar crops, and as such are part of "harvesting" of the sugar cane, just as much as it is a part of the harvesting operations for a farmer to gather in freshly cut stock feed for storage in a silo.

No reason exists for drawing any distinction between that part of the hauling operation which takes place on the portable tracks and that part which takes place on the permanent tracks.[15] Both are a part of the "gathering in" of the sugar crops. The portable tracks are used in the fields instead of the permanent tracks only because permanent tracks cannot be laid on account of the inter-

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[14] All references to Webster's Dictionary are to the Unabridged Version, Second Edition, 1945.

[15] Nor did the District Court distinguish fully between the two types of hauling, since it exempted the picking up and reloading of fallen cane stalks, even when done on the main line trackage.

ference which would otherwise result in planting and cultivating operations (R. 160). During the short periods when portable tracks are in use in the fields, they are an integral part of the railroad system over which cane cars move directly from the fields to the mill (R. 160).

The court below appeared to have denied exemption to the railroad transportation operation because it is specialized and technical work (R. 426). The railroad operation in the case at bar, however, is not comparable to a railroad facility and operation separate and apart from the farming operation. It is constructed and operated to fit the special needs of an integrated sugar plantation. The cane cars are only 10 or 11 feet by six feet by five feet (R. 160) and carloads average only 4 and ¾ tons per car gross cane (R. 157). This is to be contrasted with normal sized freight cars which measure 40 feet by 10 feet by 9 feet and if fully loaded would carry an average of 50 tons of cane. *1946 Car Builders' Cyclopedia of American Practice,* (17th ed.), edited by Roy V. Wright for Association of American Railroads, pp. 122-3. Further, many employees engaged in this transportation operation are used interchangeably in other parts of the appellant's plantation operations (R. 163, 229, 230, 231, 232-233) and likewise many service shop and other employees engage in the transportation operations as well as in other parts of the plantation's total operations (R. 195, 196, 197, 198, 201, 202, 236, 237, 242, 243, 244, 249, 251, 253).

The court below went on to hold that the exemption would not apply even if the cane were hauled by trucks rather than railroad (R. 427, 428).[16] The court thus denied the exemption to the hauling operation *per se* regardless of the medium, i. e. truck, train or animal-drawn vehicle. The record establishes beyond question, however, that appellant's railroad operation is in fact an integral part of

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[16] It was admitted by counsel for appellant during oral argument that Waialua Agricultural Company, Ltd. was considering the hauling of its cane from the fields to the mill by truck and closing down the operation of the railroad as had been done by some other plantations in Hawaii.

its business of growing sugar cane and gathering in the sugar crops, and nothing more. Such operation is a part of "harvesting" and consequently within the exemption.

3. "*Practices (including any forestry or lumbering operations) performed by a farmer . . . as an incident to . . . such farming operations.*" The exemption also includes "practices (including any forestry or lumbering operations) performed by a farmer . . . as an incident to . . . such farming operations." This part of the statutory definition not only clearly embraces all the activities shown to fall within the term "farming in all its branches," but also the activities involving the processing of sugar cane into raw sugar and molasses as well as the other activities heretofore described which the District Court held to be non-exempt.

The term "farmer" as used in the definition necessarily means a person or company engaged in performing the operations enumerated in the definition of "agriculture." The term "such farming operations" of course means the operations previously described in Sec. 3(f), among which operations are "production, cultivation, growing, and harvesting." It is clear then that appellant is a "farmer" conducting the "farming operations" of producing, cultivating, growing and harvesting sugar cane. The appellant's operations described in subparagraphs 1 to 10 (pp. 17 to 21, *supra*) are then practices performed by a farmer,

The next and separate question is whether appellant's sugar cane processing activities and its other activities held non-exempt by the District Court are "an incident to" the production, cultivation, growing and harvesting of sugar cane. We submit that they are. Webster's Dictionary defines the word "incident" as an adjective on page 1257 as:

> "1. Liable to happen; apt to occur; befalling; hence, naturally happening or appertaining, esp. as a subordinate or subsidiary feature . . . 4. Pertinent . . . 5. Law. *Dependent on, or appertaining to, another thing* (the principal); *directly and immediately pert. to,*

or involved in, something else, though not an essential part of it . . .'' [Emphasis supplied].

The word ''incident'' as a noun is defined on page 1257 as

". . . 2. That which happens aside from the main design; *subordinate action;* . . . 3. Law. *Something appertaining to,* passing with, or *depending on,* another, called the principal . . .'' [Emphasis supplied].

Appellant's operations are all completely integrated and interdependent (R. 129 *et seq.*); and the lower court found that the growing, harvesting and milling operations are all coordinated (R. 413). Agricultural supplies, equipment and laborers must be transported to the fields in order that sugar crops may be produced and harvested. The various activities relating to irrigation, including the concrete products operations, must be conducted, since appellant's plantation requires intensive irrigation (R. 145, 206-207). To prevent spoilage and deterioration the crops must be transported to the mill immediately after being burned or cut (R. 167-168). Once they reach the mill they must, for like reasons, be processed into raw sugar almost at once (R. 133, 167-168). The furnishing of water and power[17] used in connection with the growing and processing of cane, the operation of storage places and the various clerical activities are functionally necessary and indispensable for the conduct of the entire operations of appellant (e. g. R. 145 *et seq.*, 186 *et seq.*, 207-209, 253-254). The most efficient and profitable operations call for shipment of the raw sugar to mainland refineries immediately upon production (R. 185). The service shops are maintained for constant repairs and overhaul, lest a breakdown in milling, harvesting or transportation cause a shutdown of appellant's total operations (R. 194-195).

Thus, the activities in connection with the processing of sugar cane into raw sugar and molasses, as well as all other activities heretofore described, which the District

[17] It will be noted that almost 50 percent of the power is distributed to pumps on the plantation used to supply water for irrigating the appellant's cane fields (R. 192).

Court held to be non-exempt, "appertain to," "depend on," and are "directly and immediately pertinent to, or involved in" the operations of producing, cultivating, growing, and harvesting sugar cane. The "main" action or "design" is such production, cultivation, growing, and harvesting and all these other operations are "incident" to such "main design." In addition all of these other operations are "subordinate or subsidiary feature[s]" of that "main design."[18] It follows that all such subordinate operations are "practices . . . performed by a farmer . . . as an incident to . . . such farming operations" and are thus within the exemption for "agriculture."

4. *"Practices (including any forestry or lumbering operations) performed by a farmer . . . in conjunction with such farming operations."*

"Conjunction" is defined in Webster's Dictionary at page 565 as: "1. . . . union; *association;* . . . 3. *Occurrence together;* concurrence as of events . . ." [Emphasis supplied]. Since all the operations in question are, as we have shown, completely integrated and interdependent with the appellants' production, cultivation, growing and harvesting of sugar cane, they are surely in "association" therewith. Moreover, they "occur together" and are coordinated therewith (R. 135-136, 152, 413). They are therefore performed "in conjunction with" such operations.

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[18] The total direct operating charges of the appellant in operating its plantation for the calendar year 1945 were $1,726,278.24. Of this amount, $1,230,393.63 or 71% was for cultivating, irrigation water supply, harvesting, transporting of cane and other general field expenses, and $495,884.61 or 29% was for operating and maintaining the mill and purchasing sugar bags. The total number of hours of direct labor attributable to the sugar operations of the appellant for the calendar year 1945 was 1,332,679.50. Of this number, 1,024,876.25 hours were for cultivating, irrigation water supply, harvesting, transporting and other work relating to field operations while 307,803.25 hours were for operating and maintaining the mill (R. 116, 218-219, 256). The facts and figures above set forth for 1945 present a picture which is substantially true at the present time (R. 224).

5. "*Practices* (*including any forestry or lumbering operations*) *performed . . . on a farm as an incident to or in conjunction with such farming operations.*" The undisputed facts show that all the operations in question, except occasionally when truck drivers go off the farm to obtain supplies and equipment of which there is a shortage, take place solely on the farm where the cane is grown, *i.e.*, the place where the appellant's operations of producing, cultivating, growing, and harvesting sugar cane take place (R. 135).[19] The lower court also recognized that all such operations take place *on the farm* (R. 411).

Since they take place "on a farm" and, as we have shown, they are "incident to or in conjunction with such farming operations," for this reason also, such activities are within the statutory exemption.

6. "*Preparation for market, delivery to storage or to market or to carriers for transportation to market.*" Since sugar cane is always processed into raw sugar, syrup or molasses before moving in commerce (R. 133), clearly the processing operations performed by appellant upon the sugar cane and the operation of service shops and other facilities necessary and related to such processing constitute "preparation [of sugar cane] for market." This is so even though they effect a change in the raw and natural form of the sugar cane. Congress plainly did not intend that the "preparation for market" referred to in Sec. 3(f) must be preparation of agricultural commodities "in their raw or natural state," for in a closely related exemption provision, namely Sec. 13(a)(10) which exempts employees engaged within the area of production in

[19] The Secretary of Agriculture has determined that in the case of Hawaii "a farm means all land which is farmed by a producer, or group of producers as a single farming unit, with cropping practices, work stock, equipment, labor, and management substantially separate from that of any other such unit". See Determination of a Farm, etc. for the Territory of Hawaii issued by the Secretary of Agriculture, October 7, 1937, pursuant to subsec. (B) of Sec. 304 and subsection (E) of Sec. 301 of the Sugar Act of 1937. 2 F. R. 2108. Appellant's plantation meets this definition (R. 135).

performing certain operations upon agricultural commodities, Congress specifically limited the exemption to "preparing [agricultural commodities] in *their raw or natural state*" [Emphasis supplied].

Moreover, the delivery of raw sugar to the sugar warehouse constitutes "delivery to storage" and the sugar shipping operations constitute "delivery . . . to market or to carriers for transportation to market." In this connection it must be emphasized that the reference to "transportation" in Sec. 3(f) follows the reference to "preparation for market." This clearly suggests that the statute refers to transportation taking place after the preparation for market of the agricultural commodity has been completed, *i. e.* transportation to market of the prepared product.

The irrigation operations, the transportation of sugar cane from the fields to the mill, the transportation of supplies and laborers to and from the fields, and the operation of service shops and other facilities functionally necessary and indispensable to the production, cultivation, growing, and harvesting of sugar cane all precede "preparation for market, delivery to storage or to market or to carriers for transportation to market," and are therefore *a fortiori* exempt.

7. *Erroneous interpretations of District Court.* (i) The lower court limited the incidental and conjunctive practices which the Act exempts to such operations as spraying, fertilizing, irrigating, pruning, pollinating, grafting, fire or frost protection, milking, slaughtering, shearing, hide preservations, castrating, branding and similar practices that appertain to particular branches of farming, nursery, and ranching (R. 422-423). But this list is composed predominantly of activities that fall squarely within specific terms in the statutory definition of "agriculture", to wit, "cultivation and tillage of the soil," "dairying," "production, cultivation, growing, and harvesting of any agricultural or horticultural commodities," and "the raising of livestock." In order to give meaning to the remainder of the definition in Sec. 3(f), that is the part which ex-

empts incidental and conjunctive practices, the exemption cannot be limited to activities covered specifically by earlier portions of the definition.

The central fallacy in the opinion below stems from the untenable position that highly integrated or mechanized operations are necessarily industrial and therefore excluded from the agricultural exemption. *Supra,* pp. 16-17.[20] While we agree with the District Court that it is immaterial in the application of the agricultural exemption as to how a particular farm became integrated or large or the owner of its own sources of supply (R. 424), the case here is not one where a large industrial concern proceeded to buy up various agricultural and nonagricultural enterprises and merge them into one enterprise. The record shows that appellant's plantation has been substantially the same size since 1910 (R. 133), and that throughout Hawaii, sugar cane grinding is ordinarily performed by the plantation itself on the cane that it grows (R. 131, 184), a fact which was admitted by appellees' witness Hall (R. 325-327).

(ii) Contrary to the reasoning of the District Judge (R. 423, 424, 426-428), the farmer does not forfeit his farm exemption merely because he himself conducts various operations which are not exempt when conducted by independent businesses. Sec. 3(f) specifically says that all activities performed *on the farm or by the farmer* are exempt so long as they are incident to or in conjunction with the farming operations conducted on the farm. For example, transportation of produce to market is exempt when done by the farmer but not when conducted by an outsider as an independent business.

(iii) The court below also took the untenable position that the exemptions under Sec. 13(a)(6) and Sec. 7(c) are mutually exclusive (R. 420). The two exemptions in fact overlap in significant respects. For example the making of butter and cheese by the farmer from the milk of his

[20] The court in this connection made prejudiced and completely unsupported statements regarding the function and growth of Hawaiian sugar plantations generally (R. 423).

own cows is exempt under Sec. 13(a)(6), while such operations constitute the "first processing of milk . . . cream into dairy products" under Sec. 7(c) regardless of where the milk and cream come from; the ginning of cotton grown by the ginner himself is exempt under Sec. 13(a)(6), while the ginning operation is exempt under Sec. 7(c) regardless of who grows the cotton; the canning of fresh fruit grown by the canner himself is exempt under Sec. 13(a)(6), while the canning operation is exempt under Sec. 7(c) regardless of who grows the fruit (see *Bruno* v. *Hills Bros. Co.,* 7 Labor Cases ¶61,763); the stripping and stemming of tobacco grown by the stripper and stemmer himself is exempt under Sec. 13(a)(6), while the stripping and stemming operations are "first processing" of an "agricultural . . . commodity" under Sec. 7(c) regardless of who grows the tobacco; the slaughtering by the farmer of hogs raised by him is exempt under Sec. 13(a)(6), while the slaughtering of hogs is "slaughtering . . . livestock" under Sec. 7(c) regardless of who raises the hogs.

As for sugar cane, Sec. 13(a)(6) exempts the processing of sugar cane into raw sugar when performed by a farmer upon his own crop, but grants no exemption at all to the sugar cane processor who processes cane grown by others. On the other hand, Sec. 7(c) does grant exemption to the sugar cane processor who processes cane grown by others. Thus the two exemptions have different meanings and can properly exist side by side. It is true that Sec. 7(c) also exempts the processing operations of a farmer who processes his own cane, but that does not mean that the Sec. 7(c) exemption is meaningless if Sec. 13(a)(6) is also construed as covering such processing operations.

This overlapping of the two exemptions is fully understandable. Sec. 13(a)(6) is an exemption from both the wage and hour provisions of the Act, while Sec. 7(c) is an exemption from the hour provisions alone. Congress intended that if a farmer processes his own crops, such processing should be exempt under Sec. 13(a)(6). On the other hand if a person engages in the business of processing

crops of others, independent of such person, as well as his own crops, such person was to enjoy only the more limited Sec. 7(c) exemption.

D. The legislative history of Secs. 13(a)(6) and 3(f) also shows that all employees of appellant here involved fall within the exemption.

Assuming *arguendo* that interpretation of the statutory language is in doubt and requires resort to the legislative history to resolve any ambiguity,[21] that history emphatically underscores appellant's interpretation of the dominant Congressional purpose.

1. *Senate proceedings.* S. 2475[22] which ultimately became the Fair Labor Standards Act of 1938, was introduced in the Senate on May 24, 1937. As the bill was introduced, agricultural laborers were exempt but there was no definition of the term "agricultural laborer."

The Senate Committee on Education and Labor, to which the bill was referred, rewrote the agricultural exemption and defined "agriculture" as including

> ". . . farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in sub-division (g) of section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, and *any practices ordinarily* performed by a farmer as an incident to such farming operations" [Emphasis supplied]. S. 2475 as reported in the Senate July 6, 1937, Section 2, pp. 50-51.

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[21] *United States* v. *C. I. O.*, 68 Sup. Ct. 1349, 1352-1353; *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 615, 617-618; *U. S. et al.* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 547 *et seq.*

[22] The bill in its various forms—as introduced, as reported, etc.—referred to in this discussion of the legislative history will be found in "Senate Bills, 75th Cong. 1937-38, Vol. 13, 2401-2550—J-50-2d Set."

The report accompanying the bill contained only a brief statement that there was excluded from the bill—

> "persons engaged in agriculture and such processing of agricultural commodities as is ordinarily performed by farmers as an incident of farm operations" (S. Rep. 884, 75th Cong., 1st Sess., p. 6).

Senator Black, chairman of the Senate Committee in charge of the bill, in opening the Senate debate on the bill, stated that it—

> "*specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal*" [Emphasis supplied]. 81 Cong. Rec. 7648.

Appendix "A" herein, p. 81, *infra,* sets forth additional parts of Senator Black's statement.

In debate, Senator Pope asked if "dairying" would include "the farmer who bottles his own milk and cream and sells it" "even though he might do it in considerable quantity." Senator Black answered, "Unquestionably," and further, "I have no doubt that a dairy farmer who bottles his own milk is still a dairy farmer. The fact that he bottles it would not change his characteristics from that of a farmer." 81 Cong. Rec. 7656.

Senator Copeland read a telegram from the International Apple Association urging that the agricultural exemption be amended to include "preparing for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities" *Id.*, p. 7656. Senator Black commented that the Committee was not in favor of exempting the packing business as it related to many agricultural products. But he significantly added: "*The farmer or the apple grower has a perfect right, of course, to pack his own apples either alone*

or in cooperation with his farming neighbors . . . " [Emphasis supplied]. *Id.*, p. 7657.[23]

Senator Overton then asked Senator Black whether if a farmer has a large cotton plantation and gins his own cotton, the ginning operation is exempt. Senator Black said yes, that that would be a process in the agricultural handling of cotton and that the "bill does provide that *those things done with reference to commodities produced on the farm by the farmer on the farm are not included in the possible application of the Act*" [Emphasis supplied]. *Id.*, 7657.

Later in the debates, Senator Black, commenting upon a suggestion of Senator Schwellenbach that the line of distinction be made at the point of agricultural operation and that "when it becomes a processing operation, a canning operation, it ceases to be an agricultural operation," stated as follows: "Going into another phase of farming, let us take the man who raises hogs. *A great many farmers who raise hogs kill their hogs on their own farms...They prepare the hogs for market on their own farms, and then send out the product.* As the bill is framed, *there would be no possible manner in which their employees could be included under the provisions of the bill, because that would clearly be farming; . . .* " [Emphasis supplied]. *Id.*, p. 7659.

The debate went further and specifically addressed itself to the processing of sugar cane. Senator Overton inquired whether a sugar plantation with a mill at which it processed its own cane into sugar would be exempt. Senator Black replied that it would depend upon whether such

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[23] Senator Copeland later questioned Senator Black on the packing by a farmer of his own apples, his placing same in a storage house, and his subsequent transportation of the apples to market. Senator Black stated that such operations would be exempt. He drew an analogy between such operations and those of a farmer raising watermelons who packs his fruit in crates and then takes them to town to sell them either to a broker or from house to house. All such operations, he stated, would be exempt. 81 Cong. Rec. 7658. See also similar statements by Senator Schwellenbach (*Id.*, p. 7659) Appendix "A" herein, p. 81, *infra*.

processing was *ordinarily* performed by a farmer upon his crop. *Id.,* pp. 7657-7658. See Appendix "A" herein, pp. 81-83, *infra.* Since the word "ordinarily" was later stricken from the exemption before the bill was enacted, it is obvious that the grinding by a farmer of his own cane was intended to be within the exemption whether or not "ordinarily" a farmer does such grinding. In any event, cane grinding is "ordinarily" performed on its own plantation by the appellant itself on the cane that it grows, following the usual practice in Hawaii. *Supra,* p. 31.

As for exemption of operations and facilities functionally necessary and indispensable to the growing and processing of sugar cane and to the shipment of raw sugar so processed, this too was not left in any doubt. On July 30, 1937, Senator McGill introduced an amendment (*Id.,* p. 7888) to provide that the agricultural exemption should apply not only to practices ordinarily performed *by a farmer* as an incident to his farming operations, but also to practices performed *on a farm* as an incident to such farming operations. His amendment further provided that following the words "any practices ordinarily performed by a farmer or on a farm as an incident to such farming operations," there be added the words "including delivery to market."

Senator McGill stated that the purpose of his amendment was to exempt all kinds of work done on a farm so long as it was incidental to agricultural purposes and was merely preparatory to the marketing of the field crop and that the amendment would also include all kinds of labor performed in connection with making delivery to market of agricultural products. *Id.,* pp. 7888, 7927, 7928. The amendment was adopted. *Id.,* p. 7888. The discussion on the McGill amendment and also on a related amendment introduced and then withdrawn by Senator McAdoo appears in Appendix "A" herein, pp. 84-86, *infra.*

The bill as passed by the Senate on July 31 defined "agriculture" in relevant part as including

> " . . . any practices *ordinarily performed* by a farmer or *on a farm* as an incident to such farming operations, *including delivery to market*" [Emphasis supplied].

2. *House proceedings.* The bill was thereupon referred to the House Committee on Labor. As reported by such Committee on August 6, 1937 "agriculture", insofar as relevant here, was defined as including

> " . . . *any practices performed by a farmer or on a farm* as an incident to such farming operations, *including delivery to market* . . . " [Emphasis supplied]. H. Rep. 1452, 75th Cong., 1st Sess., pp. 4-5.

The bill as reported by the House Committee thus struck "ordinarily" from the definition of agriculture, so that the definition included *any practices* performed by a farmer or on a farm as an incident to farming operations, without qualifications. The Committee report made specific reference to the fact that it had stricken the word "ordinarily," thus showing that such action was not inadvertent. *Id.*, p. 11. And the definition as ultimately enacted did not contain the word "ordinarily" or any similar limitation.

The Rules Committee of the House refused to grant a rule, but on December 13, 1937, that Committee was discharged from further consideration of the bill by petition of the House membership. However, on December 17, 1937, the bill was recommitted to the Labor Committee. At that time, insofar as relevant, "agriculture" was still defined as when the bill was reported on August 6, 1937.

On April 21, 1938, another draft of S. 2475 was reported to the House. As reported the definition of "agriculture" was again broadened, and, insofar as relevant, read as follows:

> " ' Agriculture' includes . . . *any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market*" [Emphasis supplied]. H. Rep. 2182, 75th Cong. 3d Sess., p. 2.

This definition added the phrases: "preparation for market,[24] delivery to storage . . . or to carriers for transportation to market." The bill passed the House on May 24, 1938 in this form.

3. *Conference Report and debates thereon.* The Conference Report not only retained every single amendment that had broadened the definition of "agriculture," but it made that definition still more inclusive by exempting all practices performed by a farmer or on a farm "*in conjunction with such farming operations.*" 83 Cong. Rec. 9253-9254. Thus Congress was even unwilling to restrict the definition to practices that were *incident to* farming operations, but made explicit its intent that the exemption should apply as well to practices *in conjunction with farming operations.*

In Senate debate on the Conference Report, Senator Elbert D. Thomas, who had succeeded Senator Black as chairman of the Senate Committee on Education and Labor, and was chairman of the Senate conferees, stated that the agricultural exemption was purposely all-inclusive. 83 Cong. Rec. 9162-9163. See Appendix "A", herein, p. 87, *infra.*

4. *Conclusion.* The legislative history shows that Congress started with a very broad, comprehensive definition of agriculture, and that such definition at every stage of its consideration by one or the other of the houses of Congress, as the bill worked its way through to passage, was made more and more all-inclusive. Practices "performed . . . on a farm" as an incident to farming operations were added to the original definition, which was intended to include such highly mechanized or industrialized operations as milk bottling, cane sugar grinding, fruit packing, cotton ginning and hog slaughtering, and all without qualification as to whether they were "ordinarily" performed

[24] Unlike similar language in Section 13(a) (10), this is not limited by the requirement that the preparation for market of the agricultural commodities be of the commodities in their raw or natural state. Hence, any preparation for market by the farmer or on a farm is exempt even if in such preparation the raw or natural state of the commodities is changed.

by the farmer or on the farm. Also exempted were "preparation for market," "delivery to . . . market," "delivery to storage," "delivery to . . . carriers for transportation to market," and finally, practices "performed . . . in conjunction with" farming operations.

No distinction was drawn by Congress as between "large" or "small" farms or between "hand labor" or "mechanized" farms. Congress granted a sweeping exemption to *all* "agriculture," regardless of the mechanized character of the operations in order not to impose upon *any* agriculture the costs and other obligations imposed upon industry. Without the broad definition of "agriculture" which was written into the bill, it is a reasonable conclusion from the legislative history that the bill could not have been enacted into law (83 Cong. Rec. 7393, 9257).

5. *Subsequent Congressional consideration.* The proceedings in Congress subsequent to enactment of the Act may also be searched in ascertaining the Congressional purpose. *Cf. Hilton* v. *Sullivan,* 334 U. S. 323, 339, note 18. *United States* v. *South Buffalo Ry. Co.,* 333 U. S. 771, 774-780. Such proceedings particularly emphasize our conclusion that operations are not to be withdrawn from the agricultural exemption because they are highly mechanized.

The last few annual reports by the Administrator of the Wage-Hour Division, U. S. Department of Labor (hereinafter called the Administrator) to Congress recommended legislation to narrow the agricultural exemption with reference to "industrialized farms." Annual Report of the Administrator, 1943-44, p. 8; *id.,* 1944-45, p. 1; *id.,* 1946, pp. 52, 66-68. The Administrator's Report for 1946 stated that the existing exemption in Sec. 3(f) "applies to employees in all branches and types of farming *as well as to those engaged in some activities which are not primarily agriculture, if they are performed by a farmer or on a farm as an incident to, or in conjunction with farming operations"* (p. 66) [Emphasis supplied]. The Reports emphasize the very factors relied upon by appellees and the court below in recommending legislation to deny the ex-

emption to employees of "industrialized" as distinguished from "family-type" farms. *Id.*, pp. 66-68.

It is most significant that Congress has not acted favorably on any of these recommendations, or on any of the numerous bills introduced to the same effect, e. g., S. 2861 (by Mr. LaFollette) 77th Cong. 2d Sess.; S. 2062 (by Mr. Thomas *et al.*), 80th Cong. 1st Sess. Nor has Congress responded favorably to arguments in support of such bills urged by the very union here involved with respect to Hawaiian sugar plantation labor engaged in field and processing operations. See *Hearings on S. 1349,* Committee on Education and Labor, 79th Cong., 1st Sess., pp. 1048-1070; *Hearings on S. 2386* (among other bills), Committee on Labor and Public Welfare, 80th Cong., 2d Sess., pp. 317-334.

In sum, the statutory interpretation by the court below, excluding "industrialized" operations on a farm, finds no support either in the language of Sec. 13(a)(6) or in the Congressional purpose of that language as disclosed by its context and legislative history. Appellees' argument is essentially one of policy that should be addressed to Congress, not the courts. See *Hilton* v. *Sullivan,* 334 U. S. 323, 339. "For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of government' but with part of a legislative code 'subject to continuous revision with the changing course of events' . . . Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation' ". *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607, 617, 618, *per* Frankfurter, J.

E. The case law further shows that all employees of appellant here involved fall within the exemption.

In *Damutz* v. *Pinchbeck,* 66 F. Supp. 667 (D. Conn. 1946) aff'd 158 F. (2d) 882 (C. C. A. 2), referred to at p. 16, *supra,* the Sec. 13(a)(6) exemption was held to apply even though the growing of the horticultural products involved in the case was highly mechanized. *Bruno et al.*

v. *Hills Brothers Co.,* 7 Labor Cases par. 61,763, decided by the District Court of Puerto Rico, held that the canning and packing of grapefruit and the curing of citron, which were raised by defendant on its own farms, came within the agricultural exemption. The court said that so far as work done on its own products is concerned, this was work "performed by a farmer" on its own farm as an incident to its farming operations and consisted in the preparation of these products for market.

McComb v. *Farmers Reservoir Company,* 167 F. (2d) 911, (C. C. A. 10) involved employees of a mutual irrigation company engaged in maintaining and operating the company's irrigation system which furnished water to various farmers through a system of reservoirs and ditches located on the farmers' lands. In holding the agricultural exemption inapplicable, the court carefully distinguished irrigation activities by the farmer such as those here involved, saying they were a part of agriculture within the meaning of the Act when "*carried on by a farmer in continuity with other operations of the farm as a link in a chain of events leading to the growing of agricultural commodities and in the subsequent preparation of such commodities for commerce*" (167 F. (2d) at 915) [Emphasis supplied].

In *Miller Hatcheries* v. *Boyer,* 131 F. (2d) 283, 285 (C. C. A. 8) employees working at a commercial chicken hatchery in a city were held exempt as being engaged in the "raising of . . . poultry," notwithstanding that (i) the hatching of chicks by a commercial hatchery is an industrialized and highly specialized activity, having no direct connection with "farming operations"; (ii) "the economic function of such an urban establishment is completely disassociated from the . . . activities of producing and hatching eggs and feeding . . . poultry"; (iii) "when the hatching of chicks is thus transposed from the farm to a commercial establishment it ceases to be a technical farming activity"; and (iv) "the attributes of farm labor which justify its exclusion from the . . . Act" are not found in employees of a commercial hatchery.

McComb v. *Consolidated Fisheries Co.*, 75 F. Supp. 798 (D. Del. 1948), held exempt under the related fisheries exemption in Sec. 13(a)(5),[25] a watchman, cook, office employee and odd-job men of a fish processing plant, not only during the fishing season but also in the off-season when the plant was being repaired. The odd job men among other things repaired and maintained the buildings comprising the plant, the machinery in the plant and the fish wharves. They also installed machinery, drove new pilings for the wharves, operated trucks to obtain material to make repairs and made forms for concrete foundations in connection with the repair and maintenance work. The court emphasized that the cleaning of the machines and repair of the plant are impossible while fish are being processed, and hence repair work is an essential and integral part of the processing and marketing of the fish products; that the fish exemption in Sec. 13(a)(5) was intended by Congress to do for the fishing industry what Sec. 13(a)(6) does for "agriculture"; and "the broad exemption for agriculture as provided by the Act would, if applied to the fishing industry, compel the conclusion now reached by this court" (75 F. Supp. 806).[26]

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[25] Sec. 13(a) (5) exempts from both the wage and hour provisions of the Act:

> "any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof".

[26] In accord as to exemption under Sec. 13(a) (6) are: *Walling* v. *Rocklin*, 132 F. (2d) 3 (C. C. A. 8) (employees of a florist shop located in a city selling flowers grown by the employer at its greenhouse several miles away and also some flowers purchased from others); *Ridgeway* v. *Warren*, 60 F. Supp. 363 (M. D. Tenn. 1945) (cutting and manufacturing into lumber at a sawmill on the farmer's property the timber cleared from farm property so as to make the land available for agricultural purposes, even though the lumber operations were fairly extensive, the sawmill cutting about seven or eight thousand

Appellees placed great reliance below on three decisions of the United States Court of Appeals for the First Circuit all involving sugar operations in Puerto Rico. On analysis these cases are shown either to support appellant's contentions as to Sec. 13(a)(6) or at least to be clearly distinguishable from the case at bar.

In the most recent of these cases, *Vives* v. *Serralles,* 145 F. (2d) 552 (C. C. A. 1), the employer grew cane on several separate farms, on one of which was located a mill that it operated and at which it processed the cane that it grew. The employer also owned a railroad used in the transportation of the sugar cane from its outlying farms to the mill. Such railroad was not used to transport cane grown on the small farm where the mill was located. The case involved two groups of employees: (i) Employees who hauled the cane on the various outlying farms, after it was cut, to the particular farm's "concentration point" where a railroad siding was maintained, prior to its transportation to the mill. Such hauling to the concentration points was done in railroad cars pulled by oxen over portable tracks, in ox-carts, and in steel cars pulled by tractors. The cane was unloaded at such points and thereafter reloaded on railroad cars for transportation to the mill. (ii) The second group of employees worked on the farm where the mill was located. They hauled the cane from the fields of the farm to the mill on the farm, weighed it, lifted it by crane, and dropped it on the mill conveyor.[27]

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board feet of lumber a day). Cf. *McComb* v. *Super A Fertilizer Works,* 165 F. (2d) 824 (C. C. A. 1) (employees of a fertilizer manufacturer selling fertilizer to farmers for use in growing sugar cane held non-exempt, the fertilizer manufacturer not conducting any farming operations nor having anything to do with the growing of sugar cane by the farmers to whom he sold fertilizer nor performing any operation upon the farms of such farmers).

[27] In addition to such two groups, one other employee, a worker "of the mill boiler", was also in the case. As to him the only claim asserted by the employer was that he was exempt under Sec. 7(c). The court allowed the claim.

The court held squarely that both groups of employees were engaged in "agriculture" and therefore exempt under Sec. 13(a) (6).[28] It said that the situs of the activities in which the plaintiffs were engaged is the farm and that the transportation operations were really part of the "harvesting" as that term had been construed by the Administrator in par. 5(a) of his Interpretative Bulletin No. 14, 3 C. C. H. Labor Law Reporter (4th Ed.) par. 24, 488, discussed hereinafter at p. 48.

In view of the fact that the second group of employees was held exempt as well as the first group, and in view of the reason assigned by the court for its holding, namely that the situs of the activities of each group of employees was the farm, the case must be regarded as authority for the proposition that where, *as here, an employer's total operations take place on the farm where he grows cane and transports and grinds same into raw sugar,*[29] *all such operations are within the agricultural exemption.* As we have seen, the heart of appellant's operations is on the farm, the mill being completely surrounded by cane growing fields (R. 65, 114, 256).

In an earlier case, *Collazo* v. *Gonzalez,* 127 F. (2d) 934 (C. C. A. 1), the defendants owned a sugar mill where cane was processed. The cane was grown on farms owned jointly by the defendants, as well as on farms owned separately by them and also on farms owned by an independent grower. The defendants also owned and operated jointly a railroad system used to transport cane from all such farms to the mill. The facts were distinguishable

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[28] The court below thus misinterpreted the *Vives* case in stating (R. 425) that there the agricultural exemption was held inapplicable to the transportation operation.

[29] The only operation of appellant's employees not conducted on its plantation is the driving of trucks into Honolulu or any other part of the Island of Oahu to obtain supplies and equipment (R. 166). This is clearly an exempt activity under Sec. 3 (f). See the dissenting opinion of Judge Phillips in *McComb* v. *Farmers Reservoir Company,* 167 F. (2d) 911, 916 (C. C. A. 10).

from the instant case in two important respects: First, the transportation facilities and mill there involved were not incident to farming operations by one owner-farmer. Here, appellant transports and grinds only its own cane. Second, the cane there involved, after being cut on a particular farm, was hauled to a "concentration point" at the edge of the farm where it was unloaded and from there, after being reloaded on railroad cars, was hauled on main line trackage to the mill. The employees involved in the case, aside from the mill employees, were those transporting cane from the "concentration points" to the mill.[30] Here, however, there is no "concentration point" at which cane is collected, unloaded and reloaded. Cane cut in the fields is loaded into rail cars and moved in one continuous operation over portable tracks and permanent tracks directly to the mill (R. 157, 160, 161-162). There is no common pile or piles of cane in any field and no cane is ever piled at the edge of the field (R. 363).[31]

The Court of Appeals for the First Circuit there held the Sec. 13(a)(6) exemption inapplicable both to the transportation employees and the mill employees. But notwithstanding certain *dicta* in the opinion, which we

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[30] These facts appear both from the Court's statement of the facts and also from the Court's analysis of this decision, which it made in the *Vives* case in distinguishing such case from the *Collazo* case.

[31] Most of the cane is pulled from its growing or standing position by the cane loading machine and deposited immediately in the rail cars (R. 155-156, 361). While some cane not easily reached by the cane loading machine is bulldozed into piles (R. 156, 229, 361) and other cane is severed from the ground by the bulldozer rake when such rake is used to cut fire breaks through the standing cane (R. 153) or to clear lines for the portable track (R. 154, 359-360, 361), all this cane is pushed on top of standing cane (R. 361). Hence, when the cane loading machine lifts such piled cane into the rail cars, it is at the same time lifting unsevered cane (R. 361). Thus, there is nothing in the Record to support the finding of the court below that the cane harvested on appellant's cane fields is assembled at centralized points ready for transportation (R. 428). It should also be noted that the bulldozer rakes are not normally used for piling cane but are used primarily to clear the lines for the laying of portable track (R. 362).

submit are contrary to the Congressional intent,[32] the opinion emphasized that a different result would be reached if the case were one of *"farmers preparing their goods for market or sending their goods to market, or to storage, or to carriers to transport from farms to market"* as such activities *"are clearly exempt"*; or *"if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located at the farm"*, 127 F. (2d) at 937-938 [Emphasis supplied]. And when the same court had such a case presented to it, as in the *Vives* case previously discussed, it held the employees exempt under Sec. 13(a) (6). So here where all the activities of appellant take place on the farm and constitute preparation for market, delivery to storage or to market or to carriers for transportation to market, all such activities are "clearly exempt".

Still an earlier decision, *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 123 F. (2d) 387 (C. C. A. 1), involved employers engaged in transporting and processing cane grown by some 350 independent growers in addition to that which they grew themselves. Such cane of the independent growers was not grown on farms of the employers who operated the mill. Between 33 and 40 percent of the raw sugar produced by them was derived from the cane of the independent growers and necessarily, in transporting such cane the employees worked off the farm of their employer. The court held that the Sec. 13(a) (6) exemption did not apply to employees engaged in the mill operations, the transportation of raw sugar or molasses from the mills or warehouses, the transportation of sugar cane belonging to independent growers for grinding at the mills, and any necessary incident of the foregoing activities, including

[32] These *dicta* are to the general effect that transportation from the concentration point to the mill is related to processing rather than to field operations, and that Sec. 13(a) (6) exempts only the latter. In this view, the transportation is necessarily exempt from overtime requirements under Sec. 7 (c). *Infra.* p. 57. See Appendix "D" herein, p. 93, *infra,* for a statement along these lines by the union here involved.

repair and maintenance of milling and transportation facilities.

This case is obviously distinguishable from the situation herein, where all of the cane transported and processed by the appellant is produced by the appellant farmer on its own farm (R. 159,184). *Dicta* in the opinion appearing to express a contrary view, like similar statements in the *Collazo* case, *supra,* are at odds with the Congressional intent as expressed in the language of Sec. 13(a) (6) and the legislative history, *supra,* pp. 22-40. Moreover, the Court of Appeals for the First Circuit expressly did not pass on that portion of the judgment of the district court exempting those employees engaged solely in transporting to the mill the cane which their employers grew, the very situation here involved. 123 F. (2d) at 391-392.[33]

F. Administrative interpretations.

1. *Hauling of cane grown on the farm to mill.* The Administrator's Interpretative Bulletin No. 14, issued August 21, 1939, construing Secs. 13(a) (6) and 3(f), specifically stated: *"If a company has sugar cane fields and also a mill, the transportation of its own sugar cane to the mill seems an incidental practice which is included in this term"*, i.e. "practices . . . performed by a farmer . . . as an incident to or in conjunction with such farming operations" [Emphasis supplied]. ¶ 10(f). The Administrator has never modified this position.

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[33] See also *Quinones* v. *Central Igualdad,* 2 Labor Cases ¶ 18565 (1940), in which the District Court of Puerto Rico in upholding a demurrer to a complaint stated with reference to the exemption for "agriculture" in the Act:

> "If the delivery to storage or to market or to carriers is included in the definition of agriculture, surely . . . the delivery of cane to the central [mill] for the purpose of grinding or processing is likewise included within the definition. Such being the case it necessarily follows that the delivery of cane by a farmer by any means available to him is a part of the farmer's operation or incident thereto."

Paragraph 5(a) of the same Bulletin stated that the term "harvesting of any agricultural or horticultural commodities", as used in Sec. 3(f), includes all "operations customarily performed in connection with the *removal of the crops by the farmer from their growing position in the field, greenhouse, etc.*" [Emphasis supplied]. In view of the perishable quality of sugar cane, which requires its being taken to the sugar mill and processed into raw sugar immediately after cutting, the removal of the cane to the mill is thus a part of the "harvesting" operation as the Administrator has construed the term.

Paragraph 10(c) of the Bulletin discussed the term "delivery to storage", which is described in the statute as a practice incident to or in conjunction with farming operations, and stated: "The term 'delivery to storage' includes *taking the commodities . . . to the places where they are to be stored or held pending preparation for or delivery to market*" [Emphasis supplied]. Appellant's activities of transporting sugar cane from the fields to the mill are so very nearly like delivering agricultural commodities to the place where they are to be stored or held pending preparation for or delivery to market that like such delivery, they too must be regarded as coming within the definition of "agriculture".

2. *Preparation for market (processing operations).* Paragraph 10(b) of the foregoing Bulletin dealt with the term "preparation for market", appearing in Sec. 3(f) as an example of the type practices incident to or in conjunction with farming operations which are embraced by the definition of "agriculture". It stated in part that the term "preparation for market" would seem to include the following activities when performed by a farmer: drying, packing and canning fruits and vegetables, *manufacturing raw sugar,* printing and packing butter, packing cheese, canning or packing any other dairy product, ginning cotton, and stripping and stemming tobacco. These are all highly industrialized operations.

Such interpretations are entitled to weight since they represent the "contemporaneous construction of [the]

statute by the men charged with the responsibility of setting its machinery in operation; of making the parts work efficiently and smoothly while they are yet untried and new". *United States* v. *American Trucking Associations, Inc.,* 310 U. S. 534, 548. See also *Miller Hatcheries* v. *Boyer,* 131 F. (2d) 283 (C. C. A. 8).

Following the decision in *Bowie* v. *Gonzalez,* 117 F. (2d) 11, discussed *supra,* pp. 46-47, however, the Administrator in September, 1941, issued a press release (2 C. C. H. Labor Law Service, ¶ 25,651.70) stating that in the light of that decision he was of the view that, contrary to the position taken in Interpretative Bulletin No. 14, the agricultural exemption does not apply to sugar mill employees even though the only cane they grind is that grown by the sugar mill owner in his own fields. We have already pointed out that the *Bowie* case stands for no such proposition, since the facts were that the mill ground not only cane which it grew but also a substantial amount of cane grown by a large number of growers who were wholly independent of the mill owner. Such change of opinion by the Administrator, moreover, is inconsistent with the language of the exemption provision, its legislative history, the case law which we have previously discussed, and with the continued exemption of processing of other commodities such as fruit packing and canning, canning dairy products, cotton ginning and tobacco stemming, which are equally industrialized. The Administrator's changed opinion is therefore entitled to no weight. *Skidmore* v. *Swift,* 323 U. S. 134, 140;[34] *Jewell Ridge Coal Corp.* v. *Local No. 6167,* 325 U. S. 161, 169.

It is likewise significant that the Administrator has never changed his view expressed in ¶ 10(f) of Interpretative Bulletin No. 14 that the transportation by a mill owner to

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[34] In other fields of law also the principle adopted by the Supreme Court has been that administrative interpretations may be resorted to only where they have been consistent. See *Norwegian Nitrogen Co.* v. *U. S.,* 288 U. S. 294, 315, and cases cited therein; *Fishgold* v. *Sullivan Drydock Co.,* 328 U. S. 275, 290-291; *Phillips* v. *Walling,* 324 U. S. 490, 498.

his mill of the sugar cane he grows is exempt under Section 13(a)(6).

3. *Functionally necessary and indispensable operations.* Paragraph 12 of Interpretative Bulletin No. 14 stated:

> "We have received inquiries concerning office help—secretaries, clerks, bookkeepers, etc.—night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of 'agriculture' contained in Sec. 3(f). In our opinion such employees are exempt".[35]

Employees are thus exempt so long as their work is "in connection with the activities described in the definition of 'agriculture'." We have already demonstrated that the transportation of sugar cane which the appellant itself grows from the fields to the mill and the processing of such cane into raw sugar are activities described in the definition of "agriculture". Likewise, of course, the production, cultivation, growing, and harvesting of sugar cane are activities described in the definition of "agriculture". Thus, it is clear that in the Administrator's opinion the employees engaged in the functionally necessary and indispensable operations are likewise exempt, such as employees in the service shops, irrigation activities, etc., since all such operations are "in connection with" the production, cultivation, growing and harvesting of sugar cane, the transportation of such cane to the mill, and the processing of same into raw sugar. The Administrator has in fact recently advised Congress that this is his view as to irrigation operations. See Appendix "B" herein, p. 88, *infra*.

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[35] See also paragraph 10(f) of the Bulletin: "The truck drivers working for a farmer, who haul garbage and feed to the farm for feeding pigs, also perform practices that are exempt."

II.

Employee Appellees, Who Are Engaged in the Hauling of Sugar Cane From the Fields to the Mill, the Processing of Sugar Cane Into Raw Sugar, and Their Incidental and Functionally Necessary and Indispensable Operations, Are Also Exempt From the Overtime Provisions of the Act by Virtue of Sec. 7(c).

Although all of appellant's activities come within the Sec. 13(a)(6) exemption from overtime requirements (in Sec. 7(a)), some of those activities also fall within the Sec. 7(c) exemption from overtime requirements; *i.e.*, the exemption of employees of an employer "in any place of employment" where the employer is "engaged . . . in the processing of . . . sugar cane . . . into sugar". This is a material contention only if the court should be of the view that the Sec. 13(a)(6) exemption does not apply to exempt all of appellant's employees as we have contended above. In that case we submit that the employees not found exempt from overtime requirements under Section 13(a)(6) are necessarily exempt under Section 7(c). In this connection it is to be noted that in testimony before both House and Senate Labor Committees, the very union here involved conceded that (except during the off-season) all the Hawaiian sugar plantation workers are exempt from the overtime requirements of the Act either under Section 13(a)(6) or Section 7(c). *Hearings before Senate Labor and Public Welfare Committee on S. 2386* (among other bills), 80th Cong., 2d Sess., pp. 318-319; *Hearings before House Committee on Education and Labor on various bills* to amend the Fair Labor Standards Act of 1938, 80th Cong., 1st Sess., p. 1990. See Appendix "D" herein, p. 93, *infra*.

The form in which Sec. 7(c) is written leaves no room for doubt that it applies to a farmer who processes his own crops as much as to a processor who processes only the crops grown by others.

A. Description of operations held exempt and non-exempt by the District Court.

The District Court confined the Sec. 7(c) exemption to the activities performed in the appellant's mill, and even then allowed the exemption only while cane processing operations were actually being conducted or during breakdowns with the operating staff of appellant standing by waiting for the repairs to be completed (R. 442-444). The court denied the exemption to (a) transportation of sugar cane from the fields to the mill, (b) repair and maintenance of equipment and facilities used in the processing of sugar cane into raw sugar and molasses, bagging raw sugar and loading, storing and shipping raw sugar and molasses, where such repair and maintenance are not performed in the mill building proper or take place neither at a time when cane processing operations are actually being conducted nor during breakdowns with the operating staff of appellant standing by waiting for the repairs to be completed, (c) repair, reconstruction, maintenance and operation of equipment and facilities used in connection with supplying water or power to the appellant's mill for cane processing, (d) loading and shipment of raw sugar and molasses out of storage places, bins or tanks where such sugar and molasses have previously been temporarily stored, (e) week-end cleaning and repair of the appellant's mill and equipment therein, (f) repair of the appellant's mill and the equipment therein during the appellant's off-season, and the operations incident and functionally necessary to the transportation of sugar cane from the fields to the mill and the processing of sugar cane into raw sugar. These operations and activities held non-exempt[36] have been previously described. *Supra,* pp. 8, 17-18, 19-21.

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[36] One other operation held non-exempt under Sec. 7(c), namely that connected with the appellant's plantation villages, is discussed *infra,* pp. 78-79.

B. The language of the statute plainly shows that the employees of appellant held non-exempt under Sec. 7(c) of the Act by the District Court are within such exemption.

Sec. 7(c), insofar as relevant, exempts, without time limit, all employees in "any place of employment" where their employer is "engaged . . . in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup".[37] The exemption is fully applicable here.

1. *Appellant is engaged "in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup".*

Appellant is engaged in just two things: (a) producing sugar cane, and (b) processing same into raw sugar and molasses. Insofar as it is not held to be engaged in producing sugar cane, and hence not exempt under Sec. 13(a)(6), it must be held engaged in processing cane into raw sugar or in activities necessary and related thereto, and hence exempt under Sec. 7(c).

Employees working in the service shops, those transporting sugar cane from the fields to the mill, those loading and shipping raw sugar and molasses, those doing clerical work, those who carry away from the mill the dirt and rock removed from the cane when it is cleaned, and all the other employees under consideration now, are just as indispensable and as much related to sugar cane processing as employees watching gauges in the boiling house or otherwise operating the processing machinery. Employees who keep the machines in repair at the machine shop are as much engaged in processing as those who repair the machines during breakdowns at the mill with the operating staff of appellant standing by waiting for repairs to be completed. All the repair work, wherever and whenever done, is an

[37] The court below misread Sec. 7(c) in finding that it exempts the "first" processing of sugar cane (R. 420, 430). A careful reading of the Section will show that it exempts the "processing" of sugar cane and that there is no requirement that the "processing" be "first" processing, unlike the language as to "first processing" of other commodities referred to in the subsection.

indispensable requisite to the continued and effective operation of the processing facilities (R. 194, *et seq.*).

The employees who operate and maintain the equipment and facilities used in connection with the production and distribution of power are also clearly engaged in processing sugar cane. The bagasse they burn is used as fuel for the production of power for use in performing the various processing operations (R. 186-187). Even the steam that is used to generate electric power needed in the various plantation operations, after passing through the generating machinery, is conveyed through steam lines for further use in the mill's processing operation (R. 190-191). Plainly, then, the power activities are just an integral part of the processing operations. So also since the supply of water to the mill is indispensable to the performance of the cane processing operations, the employees who operate and maintain the facilities and equipment used to supply such water to the mill must be considered as engaged in the processing operation itself.

2. *The employees work in the "place of employment where he [the appellant] is so engaged" in the processing of sugar cane.* All the employees engaged in the activities presently under consideration work on the same premises where their employer is "processing . . . sugar cane . . . into sugar". This is shown by the entire Stipulation (R. 129-256). See particularly Exhibits A and F of the Stipulation (R. 65, 114, 256). The buildings in which they work, including the mill, service shops, storage places for appellant's supplies, and other buildings, are located in a small compact and contiguous area of the plantation (R. 138). All repair and shipping activities of appellant take place within 300 feet of the mill building proper (R. 114, 195, 256). Therefore, they must in fact be viewed as working in the "place of employment where he [the appellant] is so engaged". The term "place of employment" cannot mean simply a single building, when the operation, of practical necessity, requires more than one building. It must embrace the entire premises on which are located all the build-

ings required in the "processing of . . . sugar cane . . . into sugar". If Congress had meant to limit the exemption to those working in the mill building or establishment, it could easily have selected apt words thus to indicate its purpose, as it did in other sections of the statute.[38] Even the Court below agrees with these views (R. 431).

3. *The exemption provided by Sec. 7(c) for the processing of sugar cane into sugar or syrup is a year around exemption.* Sec. 7(c), it will be noted, grants some industries year around exemptions from the overtime provisions of the Act while other industries are given such exemption for only 14 workweeks per year. The industries granted year around exemption include those engaged in processing of sugar cane, sugar beets, sugar beet molasses or maple sap into sugar or syrup. Congress must have known that many employers in the industries to which it granted year around exemption, as for example the cotton ginning and the sugar cane processing industries, shut down for week-end cleaning or repairs or shut down for annual repair and reconditioning. Yet there is nothing in the language of Sec. 7(c) to suggest that where the processing machinery in such industries is shut down for necessary and indispensable cleaning and repairs the exemption should be forfeited.

Thus, the language of Sec. 7(c) fully embraces all the employees under consideration including those engaged in repair work for the mill during the week-end or annual reconditioning periods. All of this goes into the processing costs.

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[38] Cf. Sec. 13(a) (2), where Congress granted an exemption to employees in any "retail or service *establishment*" and also Sec. 12, where Congress forbade the shipment in commerce of any goods produced in an "*establishment*" in which child labor was employed. See *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607, 615-616.

C. The legislative history of Sec. 7(c) further shows that the employees of appellant held non-exempt by the District Court under Sec. 7(c) of the Act are within such exemption.

The Conference Report on the Act stated with respect to Sec. 7(c):

> " . . . (1) *It is made clear that the processing of sugar beets, sugarbeet molasses, sugarcane, or maple sap into sugar (but not refined sugar) or into syrup is included within the absolute exemption,* (2) the period of weeks *for the partial exemption* has been increased to 14, and (3) there is included *within this partial exemption* the first processing within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity during seasonal operations" [Emphasis supplied]. 83 Cong. Rec. 9254.

Moreover, Congressman Ramspeck, one of the House conferees, in discussing the conference bill and report, stated that the intention of the conferees on the sugar cane processing exemption in Sec. 7(c) was "to exempt those who process these agricultural products into sugar". 83 Cong. Rec. 9266. Obviously the absolute exemption for sugar cane processing includes incidental or functionally necessary facilities directly employed in such processing, including the operation, repairing, cleaning or maintaining of equipment, machinery and facilities used by appellant to produce power for the processing mill.

D. The case law also shows that the employees of appellant held non-exempt by the District Court under Sec. 7(c) of the Act should be held exempt thereunder.

In *Bowie* v. *Gonzalez,* 117 F. (2d) 11 (C. C. A. 1), discussed *supra* pp. 46-47, the Administrator and the employees conceded that the employees were subject to the exemption provided by Sec. 7(c). The court's discussion showed that it too regarded the employees as exempt under Sec. 7(c), pointing out several times that Sec. 7(c) exempts from the overtime provisions of the Act the processing of

sugar cane into sugar. 117 F. (2d) at pp. 17, 18-19. By this, the court meant that the exemption applied to all employees engaged in transporting sugar cane from the fields to the mill, in processing sugar cane into raw sugar, and in activities incidental and functionally necessary and indispensable to such transportation and processing, since the court had before it employees engaged in all such activities.[39]

Since appellant's entire integrated operation is engaged in two main things—the cultivation of sugar cane and its processing into raw sugar—the transportation employees are not only exempt under Sec. 13(a)(6) as incident to field operations, but also they are necessarily exempt under Sec. 7(c) as incident to processing operations. See *Collazo* v. *Gonzalez,* 127 F. (2d) 934, 937-938 (C. C. A. 1).

Some of the exemptions provided by Sec. 7(c), e.g. handling, slaughtering and dressing of livestock, are limited to particular operations in an industry. Others, however—and the processing of sugar cane into raw sugar is one of them—extend to the entire industry. The cases dealing with Sec. 7(c) exemptions recognize this distinction and make it clear that when the particular exemption involved is one that refers to an entire industry, the exemption applies to all operations which are functionally necessary and indispensable to that industry.[40] Thus, in *Heaburg* v. *Independent Oil Mill, Inc.,* 46 F. Supp. 751 (W. D. Tenn. 1942) the exemption for processing cottonseed was held to apply to all employees of a cottonseed mill, including watchmen, clerical employees, and employees hand-

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[39] Accord: *Maisonet* v. *Central Coloso* (D. P. R. 1942), 6 Labor Cases, Par. 61, 337 where the court stated (p. 63, 930) that Sec. 7(c) contemplates exemption "*in the sugar industry*" [Emphasis supplied]. See also *Vives* v. *Serrales,* 145 F. (2d) 552, 554 (C. C. A. 1), holding the Sec. 7(c) exemption applicable to an employee working at a sugar mill and engaged in mill boiler work; and *Sotomayor* v. *Plazuela Sugar Co.* (D. P. R. 1941), 4 Labor Cases, Par. 60, 656, also holding exempt an employee working at a sugar mill.

[40] The Administrator also has recognized this distinction. See his Opinion Letter dated July 9, 1941 (Appendix "C" herein, *infra,* p. 89), set forth with approval in the *San Joaquin* case discussed in the text, p. 58.

ling and selling bagging and ties, most of which was used to wrap and bind lint cotton, a by-product of the mill's business, but some of which was sold to cotton ginners.

In *Abram* v. *San Joaquin Cotton Oil Company,* 49 F. Supp. 393 (S. D. Calif. 1943) the employer operated a cottonseed oil plant consisting of several buildings and structures, including a seed storage house, mill, cleaning house, oil tanks, laboratory and others. The processing consisted of delinting, baling the lint, separating the hulls from the kernels, extracting oil, and making cottonseed cake and meal. Oil was shipped out as produced. Laboratory analyses were made while seed was being received and also at different stages of the processing operations. All operations were continuous and were performed simultaneously. The Sec. 7(c) exemption for cottonseed processing was held to apply to laboratory employees analyzing crude cottonseed oil, including some oil from other plants, employees cleaning the oil, employees loading oil into tank cars, truck drivers hauling trash and doing general work, janitors, and employees unloading cottonseed received at the mill. Thus the exemption was applied although all the operations did not take place in the same building.

McComb v. *Hunt Foods, Inc.,* 167 F. (2d) 905, recently decided by this Court, fully supports our contentions. There the exemption for the first processing of fresh fruits was held to apply to a plant engaged in producing apple juice from fresh whole apples of inferior grades and from apple peelings and cores, and producing pomace, i.e., the pulp obtained by extracting juice from the edible and inedible portions of the apples, and drying and sacking the pomace. The court held that the exemption provisions of the Act clearly indicate a deliberate purpose on the part of Congress to exempt certain business operations, including those engaged in processing fruits and grains, and such purpose is to be respected as much as the general purpose of the Act to protect industrial workers.

And in conclusion, this Court, while recognizing that exemption provisions in the Act are to be construed strictly, stated (167 F. (2d) at p. 908):

"We agree with the conclusion of the trial court that the 'remedial' provisions apply to activities excepted by the statute to the same degree and in as full measure as those which by their nature were intended to be brought, in their entirety, within the orbit of the statute, if it is made clear by the evidence that the claim of 'exception' is supported by adequate proof. In such event the Act is 'remedial' as to the activities claimed and proven to be excepted, and its remedial provisions inure to the benefit of those shown to be engaging in such excepted activities" [Emphasis supplied].

In *Hendricks* v. *DiGiorgio Fruit Corp.,* 49 F. Supp. 573 N. D. Calif. 1943), cited with approval in the *Hunt Foods* ase, *supra,* the 14 workweeks exemption per year for the rst processing of fresh fruits was held applicable to a inery engaged in making wine. The exemption was held o include the operation of distilling brandy from completely processed wine, when the brandy was to be used olely to fortify the wine being made in the establishment, n the ground that such distilling was work incidental or ecessary to the first processing operation, i.e., the making f wine.[41]

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[41] Other cases, dealing with various exemptions in Sec. 7(c), also ully support our contention that the exemption applies to all the ppellant's operations in question. See *McComb* v. *Musselman Co.,* 37 F. (2d) 918 (C. C. A. 3) (also holds exempt employees engaged in producing dried pomace from apple pulp, the court citing with approval the *Hunt Foods* case, *supra*) ; *Byus* v. *Traders Compress Co.,* 59 F. Supp. 18 (W. D. Okla. 1942) (year around exemption for compressing cotton held applicable to pressers, truck drivers, and handy-men) ; *Walling* v. *McCracken County Peach Growers Ass'n.,* 50 F. Supp. 900 (W. D. Ky. 1943) (Sec. 7(c) exemption or fruit packing industry held applicable to all employees of a fruit packing cooperative, including those who placed lids on the baskets in which the fruit was packed, those who labeled and stamped the baskets, clerical and supervisory employees, timekeepers, mechanics and watchmen) ; *Gordon* v. *Paducah Ice Mfg. Co.,* 41 F. Supp. 980 W. D. Ky. 1941) (The exemption for first processing of fresh fruits and vegetables held applicable to employees of an ice manufacturing company who iced refrigerator railroad cars several hours before strawberries, that were shipped to many parts of the country, were placed in such cars) ; *Shain et al.* v. *Armour,* 50 F. Supp. 907 (W. D. Ky. 1943) (Sec. 7(c) dairy products exemption held applicable to *employees transporting cream to the plant* and receiving it on the receiving dock and pasteurizing, testing, and churning cream) ; *McDaniel* v. *Clavin* (Calif. App. Ct.), 128

E. The administrative interpretations of Sec. 7(c) further show that the employees of appellant held non-exempt by the District Court under Sec. 7(c) of the Act should be held exempt thereunder.

The Administrator stated in Interpretative Bulletin No. 14 that Sec. 7(c) grants a "complete" exemption from the overtime provisions of the Act to employees "in any place of employment" where their employer is engaged in the processing of sugar cane into raw sugar. ¶¶ 14, 18.

Paragraph 22 of the Bulletin pointed out that the various exemptions provided by Sec. 7(c) are inapplicable to employees outside the "place of employment", but in this connection the Administrator stated that a " 'place of employment', although constituting only one establishment, *may contain several buildings in which the exempt operations are performed"* [Emphasis supplied]. Par. 22 further stated that " . . . truck drivers who carry raw materials to the establishment or who transport goods upon which the exempt operation has been performed may be considered as working in the 'place of employment' . . ."

Paragraphs 18 and 22 of the Bulletin are set forth in relevant part in Appendix "C" herein, p. 89, *infra.*

The same Bulletin also expressed the view that the Sec. 7(c) exemptions cover only the employees who perform the operations described in Sec. 7(c) or who perform operations so closely associated thereto that they cannot be segregated for practical purposes and whose work is also controlled by the irregular movement of commodities into the establishment. ¶ 23(a). The court below relied on this statement in denying exemption to many of the appellant's activities (R. 431-432). But if irregularity of movement is the criterion for exemption, the court should have denied exemption even to the cane grinding operation itself, since there is nothing irregular about the

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P. (2d) 821, *aff'd.* 22 Calif. (2d) 61, 136 P. (2d) 559 (1943) (14 workweeks exemption per year for handling, slaughtering and dressing poultry held applicable to employees picking up poultry at warehouses and delivering same to defendant's poultry plant, making deliveries to defendant's customers, opening cases of frozen poultry, dressing poultry, cleaning the premises, etc.).

movement of sugar cane from the cane fields of appellant to its mill (R. 136, 152, 210, 413). Moreover, whatever the worth of the irregularity of movement test with respect to the seasonal exemptions provided by Sec. 7(c), such test is irrelevant to the question of exemption in the case of any of the year around exemptions provided by that section, such as that accorded the processing of sugar cane into raw sugar.

Furthermore, the court below overlooked the fact that in a press release issued in January, 1943, the Administrator, explaining further the interpretation contained in paragraph 23(a) of Interpretative Bulletin No. 14, stated that in his opinion the Sec. 7(c) exemptions are applicable to the following two groups of employees: (1) those who actually perform the operations described in the section, and (2) those employees whose occupations are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to the described operations. 1944-1945 WHMan., p. 574 *et seq.* In explanation of his opinion the Administrator stated that

> "When a plant exclusively engages in activities enumerated in [Sec. 7(c)], *all of the employees* of the operator of the plant who work solely in that plant are exempt" [Emphasis supplied]. *Id.*, p. 576.

He further stated that a warehouse located across the street or across a railroad right-of-way from the packing or processing establishment may be considered part of the same place of employment. *Id.*, p. 575.

The Administrator has repeatedly recognized that the Sec. 7(c) exemptions apply to employees engaged in transporting raw materials to the plant and finished products away from it. Necessarily then he has held such employees to be working in the "place of employment", and he has so declared with respect to employees of a sugar mill. 1944-45 W. H. Man., p. 609. The Administrator has gone further and declared that the handling, labeling and casing operations in a cannery storage place may be considered as performed in the same place of employment as the canning

operation if (a) the storage place where such operations are performed is *in the same county* as the cannery building or *in a contiguous county*, (b) the canned fresh fruits or vegetables are taken directly to the staorage place from the cannery building without intermediate storage at any other place, (c) the operations are performed by employees of the canner who work interchangeably at the cannery and storage place or whose performance of the work is directed from the cannery in the same manner as if they performed it in a storage place located within the cannery.[42]

A fortiori, the various employees here involved come squarely within the two categories of employees whom Sec. 7(c) exempts. *Supra,* p. 61. They either actually perform the sugar cane processing operation or their occupations are a necessary incident to the cane processing operation. All of them work under the direction of the plantation manager (R. 137-138) on premises devoted by the employer to the cane processing operation.

Appendix "C" herein, pp. 90-92, *infra,* sets forth more extensively a number of other interpretations of the Administrator in conformity with the above.

The findings of the court below regarding fire room and power plant operations of appellant (R. 431, 433) are wholly untenable.[43] Such operations are simply component parts of the appellant's cane processing operations and take place in the same place of employment as other parts

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[42] Title 29, Ch. V, Code of Federal Regulations, Pt. 780, Subpart A (12 F. R. 7963) § 780.50; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24, 106.50.

[43] In finding that the appellant generates some electricity in a building separate from the mill building, the court flatly contradicted the record (R. 114, 131, 256). The finding that small surplus amounts of electric power are sold to a public utility company must also be rejected as contrary to the record. The record simply shows that because appellant's power system is tied into the system of Hawaiian Electric Company, Ltd., on rare and infrequent occasions, appellant will feed back power into Hawaiian Electric's lines whenever the appellant generates more power than it needs. Power is not fed back into the Hawaiian Electric lines for the purpose of selling same but only because it is a necessary, convenient and economical method of disposing of excess power. To avoid such feeding back would be costly and impractical (R. 193-194).

of the processing operations. As such they fall squarely within the Sec. 7(c) exemption. Even if some of the fire room and power plant operations are related to the field operations rather than to the processing operations of appellant, still the Sec. 7(c) exemption applies, because the fire room and power plant operations are exempt under Sec. 13(a) (6) to the extent that they relate to the field operations. And as the court below held (R. 433, 445) if an employee during a week performs some operations exempt under Section 13(a) (6) and some exempt under Sec. 7(c), the result is that the employee is exempt for that week from the overtime provisions of the Act.[44]

The court below, in its ruling on the fire room and power plant operations, also placed reliance (R. 432) on that part of paragraph 18 of the Administrator's Interpretative Bulletin No. 14 which provides that removing bagasse from the mill, and baling and compressing same are not exempt operations. This part of par. 18 of the Bulletin is completely irrelevant to the facts here. Bagasse is not removed from the mill nor is it baled and compressed. It is burned right in the mill as fuel for the production of power used in performing the various processing operations of appellant (R. 186). Furthermore, such bagasse is burned in a place of employment engaged exclusively in an operation described in Sec. 7(c) and as such comes within the exempt categories of operations listed by the Administrator. *Supra,* p. 61.

Still further, an Opinion of the Wage-Hour Division subsequent to Interpretative Bulletin No. 14 has stated that the removal of beet pulp residue from a sugar beet mill would be considered a necessary incident to the production of sugar and hence within the Sec. 7(c) exemption for the processing of sugar beets into sugar or syrup. 1944-45 WHMan., pp. 610-611. It follows that the use of cane residue; i.e. bagasse, as fuel for the production of power for use in performing the various processing operations, and

[44] The fire room and power plant operations which are related to the plantation village operations are discussed *infra* pp. 79-80, footnote 57.

the repair and maintenance of equipment used in the mill to burn such bagasse, are likewise a necessary incident to sugar cane processing operations and therefore also within the exemption.

F. The exemption provided in Sec. 7(c) is not lost when work is performed while the mill is shut down (1) for week-end repair and cleaning, or (2) for the annual period of repair and reconditioning.

1. *Week-end repair and cleaning.* Repairs are also made during the course of the week, such repairs being of the same general nature as the repairs made on the week-end (R. 184, 340-341). Even appellees' witness, Mr. Hall, admitted that it is the practice in Hawaii for sugar plantations to shut down their operations each week for the purpose of cleaning and making repairs, that such shutdown is necessary, and that repairs are also made during the week (R. 328-329). Such repairs are therefore a necessary incident to the effective conduct of the mill's processing operations. The record also shows, and the court so found (R. 434), that even on the week-end, sugar remains in process and occasionally some raw sugar is dried (R. 338, 356, 357).

The court below held that week-end cleaning and repair are not exempt under Section 7(c) and also held that in any workweek in which an employee performs some work during such shutdown period, the Sec. 7(c) exemption is inapplicable to him, notwithstanding that his work the rest of the week comes within such exemption (R. 434-435, 444).

The court's holding is of course unsound. Most of the employees, who work in the mill on weekend cleaning and repair, also work in the mill during the rest of the week when cane grinding is conducted, for weekend repairs require 35 percent to 60 percent of all mill employees (R. 184, 238-239, 339-340). If such employees are doing non-exempt work on the weekend, they lose the exemption for the entire week according to the court's holding. Such holding, therefore, proves too much, for it would destroy the exemption entirely for these employees, notwithstand-

ing that the Record shows that such weekend repairs are necessary to continue the mill's operations (R. 183-184, 329, 338-339). It is impossible for the appellant to hire a separate crew of workers just to perform the weekend repairs, and since such repairs are necessary, appellant must use the available employees. If in so doing appellant loses the exemption for such employees, then the Sec. 7(c) exemption is read out of the Act so far as appellant is concerned. Congress never could have intended such an absurd result.

The above views appear to be in accord with those of the Administrator, who apparently does not believe that the exemption is lost to an employee in any workweek in which he both engages in the processing operation and also performs some work on the weekend when the processing operation is closed down. See 1944-45 WHManual, pp. 612-613.

2. *Annual repair and reconditioning.* We submit that, contrary to appellees' contention and the holding of the court below (R. 433-435, 444), the Sec 7(c) exemption must be regarded as applicable to necessary repair work and all other work incidental to and functionally necessary and indispensable to the processing of sugar cane into raw sugar, the year around and not only during the grinding season.

Unlike certain other exemptions granted by Sec. 7(c), which are limited to fourteen workweeks in a calendar year, the exemption granted the processing of sugar cane is a year-around one without limitation. *Supra,* p. 55. This exemption therefore cannot be said to be a seasonal one. Nor is the industry in Hawaii, which is engaged in processing sugar cane into raw sugar, in fact a seasonal one (R. 136, 152, 210, 212, 413). Congress must be presumed to have known these simple facts about sugar cane production and processing in Hawaii. In view of such facts and since Congress did not see fit to limit the exemption only to the period of the year when the mill is in operation, the exemption should not be construed as so limited.

The off-season work is simply necessary repair and reconditioning work required to permit the mill to continue

operating. Just as such work is necessary to the production of raw sugar for commerce, so it is part of the processing operation and partakes of the exemption granted to processing.

The language of Sec. 7(c) refutes the findings of the District Court that in order for the exemption to apply the employees as well as the employer must, at the time, be engaged in the processing and that "it is not enough that the employer be merely established in the business of processing" (R. 434). *Sec. 7(c) grants exemption to an employer with respect to his employees "in any place of employment" where the employer is engaged in processing sugar cane into sugar or syrup. The words "place of employment" are the controlling words in the exemptive provision. So long as the "place of employment" is one where the employer processes sugar cane into raw sugar as the appellant does here, the exemption applies. There is no basis for inserting into the exemptive provision the qualification against off-season work since such work also takes place in the prescribed "place of employment". Accordingly it too must be deemed to fall within the exemption.*

The above thesis is fully borne out by an examination of the legislative history of Sec. 7(c), which shows (*supra*, p. 56) that the exemption for *processing of sugar cane* was intended to be "entire" and "absolute", unlike the partial (14 workweeks per year) exemption for the first processing of fresh fruits and vegetables and the processing of certain other agricultural commodities. But if an exemption is to be denied to the sugar cane processing operations during the off-season—a season motivated simply by the necessity of making repairs—then the exemption can hardly be deemed "absolute" or "entire".

The case of *McComb* v. *Consolidated Fisheries Co.*, 75 F. Supp. 798 (D. Del. 1948), discussed *supra*, p. 42, is in point. There it was held that the Sec. 13(a) (5) fisheries exemption in the Act applies to the cleaning of machines in a fish processing plant and the repair of the plant itself dur-

ing the off-season. The court said that such maintenance and repair work were impossible while the fish processing was being done and therefore had to be done while no fish were being caught and brought to the plant. Hence the repair work was an integral and essential part of the processing and marketing of the fish products and by-products. This reasoning is in point here (R. 210-213). The court below denied the authority of the *Consolidated Fisheries* case on the ground that there was no shutdown season there, since some 200 tons of fish scrap were processed during the time that no fish were brought to the plant (R. 435). The court in that case, however, did not rest its decision on that ground, but rather on the basis already stated above.

Clearly distinguishable is *Maisonet* v. *Central Coloso* (D. P. R. 1942), 6 Labor Cases, par. 61,337, where the court held the exemption inapplicable to a sugar processing mill in Puerto Rico during the off-season, in a case where the operating season was only six months long. The operation of sugar mills in Puerto Rico is seasonal (*Bowie* v. *Gonzalez,* 117 F. (2d) 11, 14), the shutdown being caused because sugar cane is grown there for only part of the year. This differs completely from the case in Hawaii where the grinding season is limited only by the needs of mill maintenance. See statement to this effect by the union here involved (Appendix "D" herein, p. 93, *infra*) to the Senate Committee on Education and Labor which was considering amendments to the Fair Labor Standards Act.

The court in the *Maisonet* case also relied heavily upon the fact that the number of employees during the off-season was considerably smaller than during the grinding season. Thus, said the court, if no overtime were worked during the off-season, the purpose of the Act of spreading employment among a large number of workers would be achieved. Here, however, *the facts are that the average number of man days of work performed in the mill during each 24 hour period during the off-season is 116—and that is precisely the same as the average number of man days of work performed in*

the mill during each 24 hour period during the grinding season (R. 214-215).[45]

III.

Any Employee Appellee, Who in a Workweek Performs Some Work Which is Exempt Under Sec. 13(a)(6) or Sec. 7(c) and Does Not Engage for any Substantial Part of His Time in the Same Workweek in an Activity Which is Not so Exempt, is Exempt for That Workweek From the Overtime Provisions of the Act.

We have contended above that all the work performed by the appellant's employees is exempt under either Sec. 13(a)(6) or Sec. 7(c). But if this court is of the view that some of the activities of the appellees are not exempt under Sec. 13(a)(6) or Sec. 7(c), it becomes material to ascertain the extent to which an employee may engage in non-exempt work in a workweek without losing the exemption otherwise applicable to him during that workweek.

The court below evidently took the position that an employee whose other work in a workweek is exempt under Sec. 13(a)(6) or Sec. 7(c) may lose the exemption for the entire week if he devotes as much as 10 or 20 minutes in the week to a non-exempt activity (R. 432-433, 436, 437, 445). We submit that this ruling is unnecessarily harsh and renders meaningless for all practical purposes the ex-

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[45] While the Administrator has taken the position that off-season work is nonexempt, such position is difficult to reconcile with statements made by him and the Secretary of Labor to Congressional committees. Thus, in a statement filed with the Senate Committee on Labor and Public Welfare, the Administrator referred to the year-around exemptions in Section 7(c) as "52-week overtime exemption[s]". *Hearings on S. 2386 and other bills*, 80th Cong., 2nd Sess., p. 107. And Secretary of Labor Schwellenbach, in a sectional analysis of S. 2386, advised the Committee as follows:

> "At present, if an establishment is engaged exclusively in the operations exempted under section 7(c), generally speaking *all employees* employed in that establishment are exempt from the overtime provisions of the act *for either the entire year or 14 weeks a year,* depending on the particular activities involved. This includes office, custodial and maintenance employees". *Id.,* p. 183 [Emphasis supplied].

emptions provided by Sec. 13(a)(6) and Sec. 7(c). On most farms there is no such thing as the complete segregation of employees and activities. An employee will perform whatever duties are necessary to the farm's operations. But if the agricultural exemption in the Act is to be narrowly construed so that many activities performed on the farm are to be deemed non-exempt, then under the ruling of the court below the agricultural exemption is of no avail to the farmer. The court's ruling means that in performing the operations necessary and indispensable to farming, the exemption is lost. And the same result follows with respect to the processing exemption provided by Sec. 7(c).

We submit, therefore, that Congress intended the exemption to apply to an employee in any workweek in which he does not devote a *substantial part* of his time to an activity not exempt under Sec. 13(a)(6) or Sec. 7(c). This rule takes cognizance of the realities of a farmer's or processor's operations. Moreover, it comports with the rules laid down by the Administrator with respect to many other exemption provisions in the Act. In the case of the exemptions for executives, professionals, local retailing capacity employees and outside salesmen; retail establishments; seamen; carriers by air; fishery employees; local newspapers; street and suburban railways and local trolley and motor bus operators; switchboard operators; and employees of employers subject to Part I of the Interstate Commerce Act, the Administrator has permitted a tolerance of nonexempt work ranging from 20% to 49.999%. In the case of all but the exemptions for executives, professionals, local retailing capacity employees, outside salesmen and local newspapers, the Administrator has specifically said that these percentages of nonexempt work are insubstantial. The Administrator's rulings concerning these several exemptions are detailed in Appendix "E" herein, pp. 94-95, *infra.*

The reason for allowing a tolerance of nonexempt work in the case of exemptions is that many employees in occupations intended by Congress to be exempt under one or another of the exemption provisions perform some duties

which do not strictly fall within the literal language of the exemption provisions. A failure to allow some tolerance therefore would result in so widespread a denial of the exemption provisions as to substantially defeat the Congressional intention in enacting them. This reason applies equally to the Sections 13(a)(6) and 7(c) exemptions. In view of the legislative history of such exemptions, which we have previously reviewed, showing the breadth that Congress intended to accord them, a denial of the tolerance is without justification and defeats the exemptions granted by Congress.

The Supreme Court has had occasion to consider the problem of exempt and non-exempt work performed in the same workweek only in the case of the exemption provided by Sec. 13(b)(1) of the Act for interstate motor carriers. The court ruled that if the duties of the job performed by the employee are such that he is called upon in the ordinary course of his work to perform, either regularly or from time to time, safety affecting activities, he is exempt under Sec. 13(b)(1) in all workweeks when he is employed at such job regardless of the proportion of his time and activity actually devoted to safety affecting work. *Morris* v. *McComb,* 332 U. S. 422, 434-435. See too *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695, 707-709; *Levinson* v. *Spector,* 330 U. S. 649, 675-676, 679 *et seq.;* and the Administrator's statement on the scope of the Sec. 13(b)(1) exemption, Title 29, Ch. V, Code of Fed. Reg., Pt. 782 (13 F. R. 2346) Sec. 782.2; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,108.02. It is apparent that this court need not go nearly as far as the Supreme Court went with respect to the Sec. 13(b)(1) exemption in order to adopt appellant's position herein.

Furthermore, the Supreme Court has made it clear that in order to be included in the Act in the first instance, a substantial part of an employee's activities must be devoted to interstate commerce or the production of goods for interstate commerce.[46] Several Courts of Appeals,

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[46] *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 572; *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178, 184-185.

including this Court, have had occasion to apply this rule laid down by the Supreme Court.[47] In a case dealing with the 25% nonexempt work tolerance allowed by the Administrator under the retail establishment exemption provided by Sec. 13(a)(2) of the Act, the Court of Appeals for the Eighth Circuit said that substantiality has always been the general legal test for bringing the Fair Labor Standards Act into play, in its various aspects, to its fullest reach. *Northwestern Hanna Fuel Co.* v. *McComb,* 166 F. (2d) 932, 937.

If, therefore, an insubstantial amount of engagement in commerce or the production of goods for commerce are insufficient to subject an employee to the Act, it follows that an insubstantial amount of nonexempt work should not defeat the application of an exemption otherwise applicable to him. As this court has said, the "remedial" provisions of the Act apply to exemptions to the same degree as to covered activities.[48]

IV.

THE EMPLOYEE APPELLEES, WHEN REPAIRING AND MAINTAINING APPELLANT'S HOUSES AND RELATED DOMESTIC FACILITIES, ARE NOT "ENGAGED IN [INTERSTATE] COMMERCE OR IN THE PRODUCTION OF GOODS FOR [INTERSTATE] COMMERCE" AND THEREFORE THE PROVISIONS OF THE ACT DO NOT APPLY TO SAID EMPLOYEES; BUT EVEN IF THEY ARE SO ENGAGED, THEY ARE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT BY VIRTUE OF SEC. 13(a)(6) AND SEC. 7(c).

A. Description of operations.

Among the specific duties of the employees of appellant, who render services and perform maintenance work on the

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[47] *Southern California Freight Lines* v. *McKeown,* 148 F. (2d) 890, 891-892 (C. C. A. 9) *cert den.* 326 U. S. 736 *reh'g den.* 326 U. S. 808; *Skidmore* v. *Casale,* 160 F. (2d) 527, 530 (C. C. A. 2); *Hertz Drivurself Stations, Inc.* v. *U. S.,* 150 F. (2d) 923, 926-927 (C. C. A. 8).

[48] *McComb* v. *Hunt Foods, supra,* pp. 58-59.

appellant's houses and village areas (R. 221), are repairing houses (R. 233); painting houses (R. 250); cleaning plantation villages (R. 254); pruning shade trees located around plantation houses and cutting fire wood for use as fuel by employees living in the plantation houses (R. 233); and painting gymnasiums and clubhouses (R. 250). The employees doing this work will hereinafter be referred to as village maintenance employees.

B. The village maintenance employees are not "engaged in [interstate] commerce".

The test under the Act to determine whether an employee is engaged in interstate commerce,[49] "is not whether [his] activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it". *McLeod* v. *Threlkeld,* 319 U. S. 491, 497. The test is narrow and exacting. See *Armour* v. *Wantock,* 323 U. S. 126, 131.

The only activities of the appellant which may be regarded as "in [interstate] commerce" are the shipment of raw sugar from Hawaii to the mainland and perhaps the receipt of some materials from the mainland. The village maintenance employees are so far removed from any such activities that plainly their work cannot be considered a part of it. *10 E. 40th Street Building, Inc.* v. *Callus,* 325 U. S. 578, 581; *McLeod* v. *Threlkeld,* 319 U. S. 491; *Rosenberg* v. *Semeria,* 137 F. (2d) 742 (C.C.A. 9), cert. den. 320 U. S. 770. See also *Stoike* v. *First National Bank,* 290 N. Y. 195, 48 N. E. (2d) 482, 485, cert. den. 320 U. S. 726; *Convey* v. *Omaha National Bank,* 140 F. (2d) 640, 641-642 (C. C. A. 8), cert. den. 321 U. S. 781.

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[49] "Commerce" is defined in Sec. 3(b) of the Act as "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

C. THE VILLAGE MAINTENANCE EMPLOYEES ARE NOT "ENGAGED . . . IN THE PRODUCTION OF GOODS FOR [INTERSTATE] COMMERCE".

By definition in the Act, an employee is deemed engaged in the production of goods if such employee is employed in "producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State" (Sec. 3(j)):

Activities are "necessary to the production" of goods when they bear a "close and immediate tie with the process of production" for interstate commerce, and not simply a "tenuous relation" to such process. See *Kirschbaum* v. *Walling,* 316 U. S. 517, 525. And in applying this standard, the Supreme Court has emphasized that Congress in enacting this statute "plainly indicated its purpose to leave local business to the protection of the States", *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 570; *Higgins* v. *Carr Bros. Co.,* 317 U. S. 572, 574,[50] and "did not see fit, as it did in other regulatory measures, e.g., the Interstate Commerce Act . . . and the National Labor Relations Act . . . to exhaust its constitutional power over commerce". *10 East 40th Street Bldg. Inc.* v. *Callus,* 325 U. S. 578, 579; *McLeod* v. *Threlkeld,* 319 U. S. 491, 493.

All the cases under the Act involving employees doing work akin to that of the village maintenance employees herein have excluded them from coverage. In *Wilson* v. *R. F. C.,* 158 F. (2d) 564 (C. C. A. 5), *cert. den.* 331 U. S. 810, Dow Magnesium Corporation and Dow Chemical Company had built and operated plants for producing magnesium and styrene, respectively. The magnesium and styrene

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[50] S. Rep. 884, Committee on Education and Labor, 75th Cong., 1st Sess. p. 5. "The bill carefully excludes from its scope business in the several states that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce."

were shipped in interstate commerce. Near the location of the two plants, Defense Plant Corporation acquired a 400 acre tract of land and constructed about 2,000 dwelling houses thereon. Employees of the above two plants were the main occupants of the houses. Plaintiffs worked for Defense Plant as firemen and guards of the 400 acre tract of land and the property thereon, and as operators of the plant furnishing water service to such tract. All such employees were held not covered, the court stressing that their "services *benefited the housing occupants not when they were producing goods for commerce but when they were entirely separated from the production of goods for commerce*" [Emphasis supplied].

Morris v. *Beaumont Mfg. Co.,* (W. D. S. C. 1947), 12 Labor Cases, par. 63,687, is even closer on the facts. Defendant there operated a textile manufacturing plant where it manufactured cotton textiles for interstate commerce. In addition it owned about 280 residences in the City of Spartansburg, rented primarily to its employees (of about 1100 employees, about 490 occupied the residences). The residences were within a radius of one-half mile of the manufacturing plant and were located on city streets, where they were interspersed with other dwellings not owned by the defendant. Occupancy of the residences was optional with the employees. Plaintiffs were painters or carpenters who in some workweeks were engaged exclusively in constructing, maintaining or repairing the residences. The court held that the plaintiffs were not engaged in the production of goods for commerce and pointed out that the Wage-Hour Division had ruled that the defendant had complied with the Act.[51] It said that the residences upon which the plaintiffs worked were in no sense devoted to manufacture for commerce and nothing was done therein to promote the production of goods for commerce. None

[51] Prior to this time the Administrator, in reply to inquiries, had merely stated that he was not prepared to express an opinion as to the coverage under the Act of employees repairing and maintaining houses owned by their employer and occupied as residences by other employees who were engaged in the employer's plant in producing goods for commerce (1944-45 WHMan., p. 97).

of defendant's business activities was attended to, carried on, or considered in the residences.

The problem is essentially one of degree as to the number of "steps removed from the physical process of the production of goods" for interstate movement. *10 East 40th Street Bldg., Inc.*, v. *Callus*, 325 U. S. 578, 583. Three factors in particular place these village maintenance employees beyond the scope of the Act.

First, they are not engaged on the site of whatever production is in process on the plantation, whether of cane or raw sugar, but rather do their work in a mill village physically separated from such production. Such remoteness from the physical production process is "a relevant factor in drawing the line". *Id.*

Second, they work on homes the occupancy of which is optional with the production employees, including each employee appellee herein (R. 221). The employees can live anywhere they choose, whether on or off the plantation, and the plantation operations are not any more efficient because the employees do live on the plantation. In fact, some of the employees live off the plantation (R. 222).

Third, the village maintenance employees are employed on houses and facilities which are not themselves produced for or shipped in interstate commerce, nor are they used in or devoted to the production of goods for interstate commerce. They merely "serve the needs" of the employees, as the parties stipulated (R. 219), when their occupants are *not* engaged in such production at all, but are wholly separated therefrom in space and function. Such services are as remote from production for commerce as if provided in a village not owned by the appellant.

The village maintenance work here involved is therefore far removed from activities held "necessary to" production of goods for commerce in such cases as *Kirschbaum Co.* v. *Walling,* 316 U. S. 517 and *Borden Co.* v. *Borella,* 325 U. S. 679. Such village maintenance employees are likewise further removed from production for commerce than the maintenance employees of an operator of a 48-story office building in New York, held excluded from coverage in *10*

East 40th St. Bldg., Inc. v. *Callus, et al.,* 325 U. S. 578, although the maintenance employees there involved actually furnished services to facilitate the operations of the tenants' businesses during office hours. Here, however, the employees are merely satisfying personal needs of employees viewed as a part of the general consuming public and not merely as employees. The village is really a municipality with all the physical characteristics of one and containing the usual buildings and establishments found in a municipality. Cf. *Marsh* v. *Alabama,* 326 U. S. 501, 502, 508, 510. Indeed, there reside in the village not only employees of the appellant, but also others who may or may not work in establishments which produce goods for commerce.

An occupation is not within the scope of the Fair Labor Standards Act merely because it is indispensable to the production of goods "in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods". *10 East 40th St. Bldg., Inc.* v. *Callus,* 325 U. S. 578, 582. Otherwise, any work, no matter how essentially local in nature, would come under the Fair Labor Standards Act.[52] The services in question here are "insulated from the . . . Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act", *10 East 40th St. Bldg., Inc.* v. *Callus,* 325 U. S. 578, 583, but to leave them "to the regulatory power of the States" *Id.* p. 583. In this case in fact the Territorial Legislature of Hawaii has imposed its own wage and hour requirements with respect to such services.[53]

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[52] Thus there is just as much reason for holding persons engaged in repairing houses at Haleiwa to be engaged in the production of goods for commerce as there is for so holding at Waialua, since the tenants at Haleiwa also make their living by producing goods for interstate commerce.

[53] Revised Laws of Hawaii, 1935, Ch. 259-c, Title XXVI, as amended.

D. If the village maintenance employees are engaged "in [interstate] commerce or in the production of goods for [interstate] commerce," they are exempt from the overtime provisions of the Act by virtue of Sec. 13(a)(6) or of Sec. 7(c).

If the court should find, notwithstanding our previous argument, that the village maintenance employees are engaged in interstate commerce or in the production of goods for interstate commerce, then we submit that the overtime provisions of the Act do not apply to them since that very finding brings them within the Sec. 13(a) (6) or the Sec. 7(c) exemptions under the circumstances of this case. Activities so related to agriculture and processing that they are in commerce or necessary for the production of goods for commerce, must necessarily be so sufficiently related to such activities as to share in the exemptions provided for cultivation or processing or both. Thus:

1. To the extent that the work of the village maintenance employees relates to employees of appellant who are within the Sec. 13(a) (6) exemption, they are in the same position as any other employees performing work necessary and indispensable to agricultural operations; or in the Administrator's language, they are doing work "in connection with the activities described in the definition of 'agriculture' contained in Sec. 3(f)" and are therefore exempt.[54]

Moreover, to the extent that the village maintenance employees are engaged in cutting wood for use as fuel by the appellant's employees living in the plantation villages (e.g. R. 225, 226, 229-230, 231) they are engaged in "(. . . forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations", as these words are used in the statutory definition of "agriculture". "Forestry or lumbering operations", as used in Section 3(f), include the cultivation and management of forests, felling and trimming of timber, cutting and hauling of timber, lumber, and like

[54] See Interpretative Bulletin No. 14, ¶12, discussed *supra* at p. 50.

products, sawing the logs into lumber or the conversion of logs into ties, posts, and similar products.[55] Surely if the exemption for "agriculture" may include these commercial forestry and lumbering operations when performed by a farmer or on a farm, it also includes the completely non-commercial operations involved here of cutting firewood for use as fuel by the appellant's employees living in the plantation villages.[56]

2. As for the work of the village maintenance employees which relates to employees who are within the Section 7(c) exemption, such work likewise falls within such exemption. The Administrator has said that the Sec. 7(c) exemption applies not only to those employees processing sugar cane but also to those employees whose operations are "a necessary incident" to sugar cane processing and who work in those portions of the premises devoted to sugar cane processing. If the village maintenance employees are deemed necessary to the production of raw sugar for commerce, by the same token their operations are "a necessary incident" to the operation of processing sugar cane.

Moreover, since these operations are such " a necessary incident" to the processing of sugar cane, the employees must be regarded as working at the "place of employment" where processing is performed. The term "place of employment", as used in Sec. 7(c) of the Act, must mean the entire premises on which are located all the buildings required in the processing of sugar cane. *Supra,* pp. 54-55. If the operations here discussed are necessary to the production of raw sugar for interstate commerce, then the

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[55] See par. 1 of Interpretative Bulletin No. 7 issued by the Wage and Hour Division, U. S. Department of Labor in February, 1939 (3 CCH Labor Law Reporter (4th ed.), Par. 24481) and Sec. 780.61 of the Division's statement on forestry and lumbering operations incident to or in conjunction with farming operations, appearing in the Code of Federal Regulations, Chapter V, Title 29, Part 780, Subpart B (12 F. R. 5961) (3 CCH Labor Law Reporter (4th ed.) par. 24106.61).

[56] Such wood cutting operations are of course "incident to" or "in conjunction with" the appellant's farming operations. See the discussion on pp. 26-28, *supra,* as to the meaning of "incident to" and "in conjunction with" as used in Section 3(f).

buildings in or about which such operations take place, including the dwelling houses, are required in the processing of sugar cane and must be considered part of the same "place of employment" as the mill and functionally related buildings.

3. If the work of the village maintenance employees relates partly to employees exempt under Sec. 13(a)(6) and partly to employees exempt under Sec. 7(c), they are obviously exempt from the overtime provisions of the Act.

E. Any employee appellee, who in the same workweek performs some work that is not within the coverage of the Act and other work which is exempt under either Sec. 13(a)(6) or Sec. 7(c), is exempt during such workweek from the overtime provisions of the Act.

Some of the employees we are presently considering, as for example employees in the paint shop, the plumbing shop and the carpentry shop, do work in the same workweeks with respect to the plantation houses and also with respect to the field and mill equipment of the appellant (e.g. R. 202-203, 249, 254-255). Their work on the houses is not covered by the Act at all, while the work on the field and mill equipment is exempt under either Sec. 13(a)(6) or Sec. 7(c). In such situation, where in the same workweeks they are performing both work that is not sufficiently close to commerce or to the production of goods for commerce to be considered covered by the Act at all, and work that is exempt under Sec. 13(a)(6) or Sec. 7(c), they are obviously excluded from the overtime provisions of the Act.[57] The

[57] *Fitzgerald* v. *Kroger Grocery,* 45 F. Supp. 812 (D. Kans. 1942) holding exempt from the overtime provisions under Sec. 13(b)(1) employees who in the same workweeks were engaged in driving trucks in interstate commerce—an activity exempt under Sec. 13(b)(1)—and other driving which was wholly in intrastate commerce and hence not covered by the Act at all.

The same principle applies to the employees working in the power plant of the mill. Power there produced is used in the field and mill operations of the appellant and the employees are thereby entitled to a Sec. 13(a)(6) or Sec. 7(c) exemption. Power is also

Administrator is in accord. 1944-45 WHMan. p. 608 and 2 C. C. H. Labor Law Service ¶ 33,083. The court below also appears to share this view, since it held that an employee engaged in activities, some of which are exempt under Sec. 13(a)(6) and the remainder of which are exempt under Sec. 7(c), is exempt (R. 433,445).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that Parts I, III, IV, V, and VI of the judgment below should be reversed.

Respectfully submitted,

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distributed in the same workweeks to the plantation villages and to some non-plantation users, but none of such power is used for or in connection with the production of goods for interstate commerce, nor is it used to operate any instrumentality of interstate commerce nor is it transmitted into interstate commerce (R. 191-193). The power plant employees are thus in the same workweeks doing some work exempt under Sec. 13(a)(6) or Sec. 7(c) and other work not covered by the Act at all. As explained in the text, they are therefore excluded from the overtime provisions of the Act during such workweeks.

APPENDIX A.

Legislative History of Secs. 13(a)(6) and 7(c).

1. *Senator Black's statement opening debate in the Senate on S. 2475.*

"We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture." 81 Cong. Rec. 7648.

2. *Statement of Senator Schwellenbach that packing by a farmer of his own grown apples was exempt under the bill.*

"When an apple grower picks his apples and takes them into his own warehouse . . . and in that warehouse packages them and then stores them, or perhaps first stores them and then packages them, the work being done by the farmer on his own farm, there is *no dispute about the fact that it is an agricultural operation.* . . . It seems to me that the bill, under the definitions as they now stand, places at a considerable disadvantage the man who is too small an operator to perform these operations upon his own farm. . . . The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the washing of the apples and the packing of the apples are all agricultural processes" [Emphasis supplied] 81 Cong. Rec. 7659. To get at the situation about which he was complaining, Senator Schwellenbach later introduced an amendment to provide an exemption for persons employed within the area of production "in preparing, packing, or storing . . . fresh fruits or vegetables in their raw or natural state" (*Id.*, p. 7876). This amendment was adopted (*Id.*, p. 7949).

3. *Debate in Senate on processing of sugar cane.*

"Mr. Overton. Let me invite the attention of the Senator to another agricultural industry in connection with which the processing, if it may be so called, by the farmer of his own product is much more general than in the case of the farmer ginning his own cotton. I refer to the sirup-cane producer who processes his

own cane, grinds it, and makes it into sirup. Does he come within the provisions of the bill?

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"Mr. Black. The Senator can read the definition in *the bill and note that those things ordinarily done by farmers on the farm do not come under the provisions of the bill.*

"Mr. Pepper. Mr. President, I wonder if the following language would not answer the questions of the Senator from Louisiana. It is found on page 51 of the bill, lines 13 and 14, being a part of the agricultural definition: 'And any practices ordinarily performed by a farmer as an incident to such farming operations.'

"Mr. Overton. It may and it may not. I was asking the Senator from Alabama because he is the author of the bill, and I was giving a concrete case . . . I have taken the case of a farmer who *plants his sugarcane, gathers it, and who on his own farm has a sirup mill and converts the juice of the cane into sirup. Does he come within the provisions of the bill?*

"Mr. Black. *The definition provides that those things done by the farmer ordinarily on his farm* constitute a part of his farming business. It would *depend upon whether or not that was an ordinary incident to that type of farming business in the State where sirup is made. If so, that would be agriculture under the definition of the bill.*

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"Mr. Overton. It would not be considered an ordinary practice performed by a farmer as an incident to his farming operations for the reason that we also have large sirup mills. Such sirup mills gather in the cane produced by the different farmers and process it into sirup. But it is of frequent occurrence that a farmer has a mill on his own farm and converts his own cane juice into sirup. With that explanation, would the Senator say the practice of such a farmer is one ordinarily performed by a farmer as an incident to his farming operations?

"Mr. Black. If the Senator says it is a practice not ordinarily performed by a farmer as incident to his farming operations, I would necessarily say it was a practice not ordinarily performed by a farmer as incident to his farming operations, and therefore would

not come under the definition. I am assuming it is a practice which is not ordinarily engaged in, by farmers.

"Mr. Overton. Not altogether engaged in, but frequently engaged in by farmers.

"Mr. Black. For instance, a farmer might build on his farm a factory for the purpose of manufacturing shirts and sending them through the United States. Since that is a practice not ordinarily engaged in by farmers on their farms, naturally that would not be considered a farming activity.

"Mr. Overton. *Let us take the sugar manufacturer. On some plantations there are mills in which the planters may manufacture their own cane into sugar. Would they come within the provision of the bill?*

"Mr. Black. *As I said, it would depend upon whether or not that comes within the definition under the facts of operation, whether it is a necessary incident to that type of cane farming . . .*

* * * * * * *

"Mr. Overton. As I understand the Senator, in cases where some farmers process their own products and other farmers carry their products to some processor to be processed, then by reason of the fact that some farmers carry their products to a processor to be processed, the farmers who process their own products would not be considered as engaging in a practice which is ordinarily incident to farming operations.

"Mr. Black. I could not say as to that. It depends altogether on the facts as to what is a necessary incident to farming. As I said, there are some things so far removed from farming that all of us would know instantly they did not constitute a farming operation. The illustration I gave was of a farmer erecting on his farm a factory and manufacturing anything you please, whether something he grows or not, who employs many people to manufacture it, and then ships it in interstate commerce. The mere fact that he has such a plant on his farm would not make the manufacturing of shirts, for instance, a farming operation. It would still be a manufacturing operation. The same reasoning would apply to any other process of manufacturing" [Emphasis supplied]. 81 Cong. Rec. 7657-7658.

4. *Debate on Senator McGill's amendment to provide that the agricultural exemption should apply (1) to practices performed on a farm as an incident to farming operations and (2) to "delivery to market."*

"Mr. McGill. Mr. President, the purpose of the amendment is to broaden the definition of 'employee' as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a thrashing [sic] machine outfit and employs a crew and is employed by a farmer to thrash [sic] his wheat might be included under the provisions of the bill. *Likewise, those who are engaged in harvesting and delivering to market might be included.* It is my understanding, although no definite commitment has been made, that the amendment is not opposed by those in charge of the bill. If I am correct, I should like to have the amendment agreed to.

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"Mr. George. Is it the purpose of the amendment to exempt those who thresh grain?

"Mr. McGill. Those who thresh grain, who harvest grain and *deliver it to market.*

"Mr. George. Would the amendment also *apply to the harvesting of any other crop?*

"Mr. McGill. *It would apply to any commodity produced on a farm.*

"Mr. George. Would it apply to peanut pickers who pick in the fields?

"Mr. McGill. Yes.

"Mr. George. *And who move peanuts to the market?*

"Mr. McGill. *Yes;* that is my understanding.

"Mr. George. I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

"Mr. Black. *That is my interpretation of the amendment,* and is it my belief that the bill as originally drawn covers what is now contained in the language of the amendment; but some Senators who were doubtful about it wished to draw a clarifying amendment.

"Mr. George. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama,

the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

"Mr. Black. *Unquestionably.*

"Mr. McGill. I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, *so long as it is incidental to agricultural purposes.*

"Mr. George. *And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop.* Is that true?

"Mr. McGill. *That is true; and the language would also include all labor performed in making delivery to market.*

"Mr. George. I thank the Senator .

"Mr. Copeland. Of course, that would take care of my apple man, about whom I have been worrying, would it not? *It would take care of the farmer who takes his crop of apples to the market, would it not?*

"Mr. McGill. That is correct. [Emphasis supplied]. 81 Cong. Rec. 7888.

5. *Debate on amendment proposed by Senator McAdoo.*

Senator McAdoo proposed an amendment, substituting for the language in the definition of agriculture relating to practices ordinarily performed in connection with farming operations, the following:

> "Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits." 81 Cong. Rec. 7927.

The following discussion ensued:

> "Mr. McGill. Yesterday afternoon the Senate amended the lines to which the Senator's amendment applies by inserting in line 13, after the word 'farmer,' the words 'or on a farm,' and also by inserting in line 14, after the word 'operations,' the words 'includ-

ing delivery to market,' *it being the purpose of these amendments to exclude from the bill all labor performed on a farm,* whether by contract with the farmer or otherwise, and to *exclude all labor connected with the delivery to market of commodities produced on a farm.* . . .

* * * * * * *

". . . I will state that I feel the amendment adopted yesterday is broader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted yesterday, such as mentioning harvesting, packing, and operations of that character. *The amendment adopted yesterday was intended to include, and, I think, it does include, all kinds of labor performed on a farm and all kinds of labor in connection with delivering agricultural products* to market. In my judgment it includes more than does the amendment proposed by the Senator from California and is broader in its terms. I hope that the amendment adopted yesterday will remain in the bill and that the amendment of the Senator from California, by virtue of the narrower terms carried in it, will be rejected.

"Mr. George. I suggest to the Senator from California that, in my opinion the amendment offered by the Senator from Kansas [Mr. McGill] yesterday is broader than his amendment, because it takes care of all operations, whether performed by cooperatives or by persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well-known rule of construction, form a limitation upon what is first stated as a broad general proposition. I think the Senator's purpose is absolutely accomplished by the amendment offered yesterday by the Senator from Kansas.

"I may say to the Senator from California that I had in mind precisely what he has in mind, but with reference to different products. After examining the amendment of the Senator from Kansas I concluded that it covered all those cases as well as the cases which I think the Senator himself has in mind" [Emphasis supplied]. *Id.,* pp. 7927, 7928-7929.

6. *Debate on Conference Report between Senator Thomas and Senator Johnson.*

"Mr. Johnson of California. *I take it from what the Senator has said that the agricultural exemptions are practically plenary, and take in almost all agricultural products.*

"Mr. Thomas of Utah. I could not hear part of the Senator's sentence.

"Mr. Johnson of California. *I said that, in general language, agriculture is exempted from the operation of the bill.*

"Mr. Thomas of Utah. *It is.*

"Mr. Johnson of California. *Does the Senator know of any particular kind of agriculture that is included in the bill?*

"Mr. Thomas of Utah. *I do not know of any. The definition seems to be all-inclusive, and we tried to make it so"* [Emphasis supplied]. 83 Cong. Rec. 9162-9163.

APPENDIX B.

Administrator's Interpretation of Section 3(f) With Respect to a Farmer's Irrigation Operations.

"At the present time the Administrator, by interpretation, has considered exempt under the 13(a)(6) exemption as engaged in agriculture, those employees of irrigation companies who are engaged exclusively *on* a farm or farms in furnishing water used solely for irrigation purposes thereon, and also those employees who may be engaged off a farm in activities concerned solely with the application of water to *particular* farms, as in operating the last head gate for diverting or distributing water to a particular farm. On the other hand, employees engaged in the general distribution of water, whose work is not confined to the application of water directly to individual farms, have not been considered to fall within the 13(a)(6) exemption as engaged in agriculture". *Hearings on S. 2386 and other bills,* Committee on Labor and Public Welfare, 80th Cong. 2nd Sess., p. 170 (sectional analysis of S. 2386 submitted by Secretary of Labor Schwellenbach).

APPENDIX C.

Administrator's Interpretations of Section 7(c).

1. *Distinction drawn between Sec. 7(c) exemptions referring to an entire industry and Sec. 7(c) exemptions referring to particular operations in an industry.*

"The exemption thus granted to cottonseed processing differs from that granted in the same section of the Act to certain operations upon livestock. The latter exemption appears limited to certain particular operations, since Sec. 7(c) does not use any term descriptive of the meat packing industry, but uses only words describing certain particular operations in such industry. With this distinction in mind *it appears to us that all employees working in a plant engaged in processing cottonseed are within the exemption,* while this would not be true of all employees working in a plant engaged in handling, slaughtering or dressing livestock. In the latter case only the employees engaged in the enumerated operations or in operations that are an integral part thereof would be exempt" [Emphasis supplied]. Opinion Letter of Administrator written on July 9, 1941.

2. *Paragraphs 18 and 22 of Interpretative Bulletin No. 14.*

". . . The term 'raw sugar' describes the product of the first processing of sugar cane, which product normally is thereafter refined before it is consumed. The processing of sugar cane into raw sugar is within the exemption; . . ." ¶ 18.

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". . . truck drivers who carry raw materials to the establishment or who transport goods upon which the exempt operation has been performed may be considered as working in the 'place of employment', for they make regularly recurring trips to and from the establishment and may be deemed attached thereto. Further, some of their work, such as loading and unloading, takes place in the establishment. . . ." ¶ 22.

3. *Interpretations as to which employees of a processor are exempt under Section 7(c).*

"When an establishment is *exclusively* engaged in performing operations specifically mentioned in Sec. 7(c), every employee working in such a plant either will be actually engaged in the described operations, or else will be engaged in an occupation which is a necessary incident to the described operations and working solely in a portion of the premises devoted by his employer to such operations. *Therefore, when an establishment is exclusively engaged in activities enumerated in the section, all of the employees of the operator of the establishment who work solely in that establishment, including office employees, watchmen, maintenance workers and warehousemen, come within the scope of these exemptions. In such a situation, the exemptions also apply to those employees of the plant operator whose duties consist of hauling agricultural commodities from the fields or from receiving stations to the plant for packing or processing, and to those who transport to market or to carriers for transportation to market goods upon which exempt operations have been performed in the plant"* [Emphasis supplied]. 1944-45 W. H. Manual, p. 575.

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"Where an establishment is solely engaged in the canning of fresh fruits and vegetables, the labeling, stamping and boxing of the canned goods during the active season by employees of the canner *are exempt operations if performed in the cannery or in a warehouse located on the same premises as the cannery.* On the other hand, activities performed in a warehouse located on premises separate from the cannery, are not conducted in the place of employment where the canning is done, and the exemption is inapplicable to all of the employees working in such a warehouse" [Emphasis supplied]. *Id.*, p. 577.

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". . . where an establishment is *solely* engaged in the packing of fresh fruits or vegetables and refrigerator cars are spotted on tracks adjoining the plant, the employees of the packer engaged in bunker icing or in cooling cars solely for use in shipping fresh fruits and

vegetables packed in that establishment are exempt'' [Emphasis supplied]. *Id.,* p. 577.

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"If the plant is used *solely* to pack fresh fruits and vegetables, the assembling of box shook by employees of the packer is exempt when performed during the active season *solely in the packing plant or in a warehouse located on the same premises''* [Emphasis supplied]. *Id.,* p. 577.

* * * * * * * * *

"At present, if an establishment is engaged exclusively in the operations exempted under section 7(c), generally speaking all employees employed in that establishment are exempt from the overtime provisions of the act for either the entire year or 14 weeks a year, depending on the particular activities involved. This includes office, custodial and maintenance employees.'' Statement of Secretary of Labor Schwellenbach submitted to Senate Committee on Labor and Public Welfare, *Hearings on S. 2386 and other bills,* 80th Cong. 2nd Sess., p. 183.

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An Opinion of the Wage-Hour Division, dated March 18, 1941, held that the Sec. 7(c) exemption applied to field men employed by canneries to supervise the production and harvesting of raw products purchased under acreage contracts. These men, like employees transporting cane to the mill in the instant case, spend most of their time in the fields but they make the cannery their headquarters and make regularly recurring trips to and from the cannery. The Division held that they should be considered as working in the "place of employment''. 2 C. C. H. Labor Law Service, ¶ 24,700.63. Another Opinion Letter, dated March 18, 1941, held that the Sec. 7(c) exemption applies to pea vining stations if the work performed at the vineries and the cannery, to which vined peas are thereafter removed, is performed as part of a continuous series of operations throughout which the peas remain perishable. 2 C. C. H. Labor Law Service, ¶ 24,-700.731.

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In the Administrator's press release answering certain questions about the application of the Sec. 7(c)

exemption to canneries, he pointed out that a truck driver engaged solely in transporting canned citrus from a cannery to market was within the exemption and must be regarded as employed in those portions of the establishment devoted by the employer to the operations described in Sec. 7(c), i.e. the canning of fresh fruits and vegetables. 1944-45 WHMan., pp. 603-604.

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An opinion of one of the Administrator's attorneys, appearing in 1944-45 WHMan. p. 612, declared that the Sec. 7(c) exemption for processing cottonseed applied not only to the oil mill in which the cottonseed was crushed but also to a storage house, in which hulls removed from the cottonseed and cottonseed meal were stored.

APPENDIX D.

Statements of International Longshoremen's and Warehousemen's Union to Senate Labor Committee.

"The cane sugar industry [in Hawaii] has three distinct stages. *The first step is the growing and cultivation of cane and the second the milling of cane into raw sugar,* both stages being carried on in the Territory of Hawaii . . . [The third step is the refining of raw sugar and that is carried on in the mainland]." *Hearings on S. 1349,* 79th Cong., 1st Sess., p. 1049.

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"The ILWU represents some 28,000 workers engaged in the production and processing of sugar in the Territory of Hawaii. We represent, also, some 8,000 workers in the pineapple industry in the islands. The bulk of these workers are not covered by the Fair Labor Standards Act.

"In the sugar industry, more than 18,000 are field workers, so employed throughout the year. Their work is not seasonal in character. They are, of course, not covered.

"Most of the remaining 10,000 sugar workers are engaged in converting cane into raw sugar in the mills. Though covered by the wages provisions of the act, they are for 10 months of the year excluded by section 7(c) from the hours provisions. During the remaining 2 months, when the mills are shut down for repairs and maintenance, they are covered." *Hearings on S. 2386* (among other bills), 80th Cong. 2d Sess., p. 318.

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"The grinding season, during which all mill employees are excluded from the hours provisions of the Fair Labor Standards Act, is limited only by the needs of mill maintenance. Cane is harvested and milled during 10 months of the year. During the remaining two months the mill is shut down and essential repairs are made on the mill, plantation machinery generally, and plantation facilities." *Hearings on S. 1349,* 79th Cong., 1st Sess., p. 1050.

APPENDIX E.

Administrator's Allowance of Tolerance of Non-Exempt Work in the Case of Most Exemption Provisions in the Act.

In the case of the following exemptions, the Administrator has allowed the indicated percentage of non-exempt work in a workweek without loss of the exemption:

Sec. 13 (a)(1) exemption for executives, professionals, local retailing capacity employees and outside salesmen—20%.[1]

Sec. 13(a)(2) exemption for retail establishments—25%.[2]

Sec. 13(a)(3) exemption for seamen—20%.[3]

Sec. 13(a)(4) exemption for carriers by air—20%.[4]

Sec. 13(a)(5) fishery exemption—20%.[5]

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[1] Regulations, Pt. 541, Title 29, Ch. V. Code of Fed. Reg. (5 F. R. 4077) §§ 541.1 (F), 541.3(A) (4), 541.4(B) and 541.5(B); 3 C. C. H. Labor Law Reporter (4th Ed.) ¶¶ 23,301.01(F), 23,301.03(A) (4), 23,301.04(B), 23,301.05(B). See too *Knight* v. *Mantel*, 135 F. (2d) 514, 517-518 (C. C. A. 8), *Bender* v. *Crucible Steel*, 71 F. Supp. 420, 425 (W. D. Pa. 1947), both of which applied the 20% test. See also *Walling* v. *General Industries*, 330 U. S. 545, 547; *Atkinson Co.* v. *Lassiter*, 162 F. (2d) 774, 777 (C. C. A. 9), judgment vacated on other grounds, 166 F. (2d) 144; and *Helliwell* v. *Haberman*, 140 F. (2d) 833, 834 (C. C. A. 2) which seem to approve the 20% test.

[2] Administrator's Interpretative Bulletin No. 6, ¶ 18; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,480. See also Title 29, Ch. V, Code of Fed. Reg., Pt. 779 (13 F. R. 1376) § 779.2; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,105.02. The 25% test has been applied as appropriate in a number of cases. *Harris* v. *Hammond*, 145 F. (2d) 333, 334 (C. C. A. 5) *cert. den.* 324 U. S. 859; *Northwestern Hanna Fuel Co.* v. *McComb*, 166 F. (2d) 932, 937-938 (C. C. A. 8); *Brown* v. *Minngas Co.*, 51 F. Supp. 363,371 (D. Minn. 1943).

[3] Title 29, Ch. V, Code of Fed. Reg., Pt. 783 (13 F. R. 1376), § 783.50; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,109.50.

[4] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart A (13 F. R. 1376) § 786.1; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,112.01.

[5] Title 29, Ch. V, Code of Fed. Reg., Pt. 784 (13 F.R. 1376) § 784.1; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,110.01.

Sec. 13(a)(8) exemption for local newspapers — 49.999%[6]

Sec. 13(a)(9) exemption for street, suburban, etc. railways and local trolley and motor bus operators—20%.[7]

Sec. 13(a)(11) exemption for switchboard operators—20%.[8]

Sec. 13(b)(2) exemption for employees of employers subject to Pt. I of the Interstate Commerce Act—20%.[9]

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[6] 3 C. C. H. Labor Law Reporter (4th Ed.) ¶¶ 25,260.05 and 25,260.34. The 49.999% test was also applied in *Robinson* v. *North Arkansas Printing Co.,* 71 F. Supp. 921, 923 (W. D. Ark. 1947).

[7] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart B (13 F. R. 1376) § 786.50; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,112.50.

[8] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart C (13 F. R. 1376) § 786.100; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,112.100.

[9] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart D. (13 F. R. 1376) § 786.150; 3 C. C. H. Labor Law Reporter (4th Ed.) ¶ 24,112.150.